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Constitutional Law - Author Can Be Prosecuted under Federal Mail Fraud Statute for Misrepresenting Contents of Book

Virginia L. Flick

CONSTITUTIONAL LAW—AUTHOR CAN BE PROSECUTED UNDER FEDERAL MAIL FRAUD STATUTE FOR MISREPRESENTING CONTENTS OF BOOK.

In re Grand Jury Matter (Gronowicz) (1985)

I. INTRODUCTION

The Federal Mail Fraud Statute provides that any use of the mails in conjunction with a scheme to defraud is a criminal act.[1] Due to its broad language and courts' liberal application,[2] the Mail Fraud Statute has

1. 18 U.S.C. § 1341 (1982). Section 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id. In a similar vein, the wire fraud statute makes fraudulent use of wire, radio, or television a crime. 18 U.S.C. § 1343 (1982). Section 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id. Because the language of the mail and wire fraud statutes is virtually identical, case analysis of one statute may be used to interpret the other statute. United States v. Giovengo, 637 F.2d 941, 944 (3d Cir. 1980), *cert. denied*, 450 U.S. 1032 (1981). Because of the similarity in the interpretation and application of the mail and wire fraud statutes, only the mail fraud statute will be discussed further in this case brief. *Compare* 18 U.S.C. § 1341 *with* 18 U.S.C. § 1343; *see also In re* Grand Jury Matter (Gronowicz), 764 F.2d 983 (3d Cir. 1985) (*en banc*) (relying on cases defining the scienter requirements for mail fraud in order to determine the constitutionality of a grand jury investigation into possible violations of the mail and wire fraud statutes), *cert. denied*, 106 S. Ct. 793 (1986).

2. The Supreme Court, in *Pereira v. United States*, set forth the elements of mail fraud as: (1) a scheme to defraud, and (2) a mailing for a purpose of executing the scheme. 347 U.S. 1, 8 (1953). In order to satisfy the second element, however, the defendant need not actually mail anything. Rather, the mailing element is satisfied if the defendant "caused" something to be mailed. *Id.* at 8.

been utilized by United States attorneys to prosecute a variety of frauds.[3] Recently, federal prosecutors used the Mail Fraud Statute in an effort to indict an author for allegedly fraudulent representations made to a publisher concerning the author's nonfiction book; the prosecutors' action gave rise to *In re Grand Jury Matter (Gronowicz)*.[4] During the course of a grand jury investigation into these charges, a subpoena *duces tecum* was directed against the author.[5] The author refused to comply with the

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One court has indicated that any of the following acts satisfy the mailing requirement: 1) a mailing *incidental* to an essential part of the fraudulent scheme; 2) a mailing which is made to *promote* the fraudulent scheme; 3) a mailing related to the acceptance of the proceeds of the fraudulent scheme; or 4) a mailing which facilitates concealment of the fraudulent scheme. United States v. Wormick, 709 F.2d 454, 462 (7th Cir. 1983).

The Supreme Court paved the way for an expansive reading of the mail fraud statute in *Parr v. United States*, where it found that the purpose of the federal mail fraud statute was to prevent the post office from being used to effectuate schemes contrary to public policy. 363 U.S. 370, 389 (1960). Regardless of whether the federal government can prosecute for the actual fraudulent scheme, the Court concluded that Congress has authorized prosecution under the mail fraud statute the moment the mails are employed in furtherance of such a fraudulent scheme. *Id.*

3. Since its enactment, Federal prosecutors have applied both statutes to many different types of fraud. *See* Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 711, 722 (1980). According to Rakoff:

> [the federal] mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the "first line of defense" against virtually every new area of fraud to develop in the United States in the past century. Its applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery.

Id. Other commentators agree, stating that "[t]he federal mail fraud statute, as it is now known, has been expansively interpreted to invite federal prosecution of virtually every type of untoward activity known to man." Hurson, *Limiting the Federal Mail Fraud Statute*, 20 AM. CRIM. L. REV. 423, 424 (1983). For a list of cases applying the Federal Mail Fraud Statute to various types of fraud, *see id.* at 424 nn.10-12; Note, *A Survey of the Mail Fraud Act*, 8 MEM. ST. U.L. REV. 673, 673 nn.2-7 (1978).

4. 764 F.2d 983 (3d Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 793 (1986). The government was investigating the author for possible wire fraud in addition to mail fraud. In its opinion, however, the Third Circuit only discussed the mail fraud statute. 764 F.2d at 988-89. For a discussion of the similarity of the mail and wire fraud statutes, see *supra* note 1.

5. 764 F.2d at 984. The subpoena *duces tecum* ordered the author to hand over notes, recordings, and travel records connected with the writing of the book, *God's Broker*, in order

> *to determine if the book accurately portrays any notes of conversations with the individuals in the book* to whom the statements are attributed . . . [and] to determine if records exist showing that Gronowicz actually made the various trips to Poland, the Vatican, and other places *which he claims to have visited in the book.*

Id. at 995 (Higginbotham, J., dissenting) (emphasis supplied by Judge Higginbotham).

order on the grounds that the mail fraud investigation was beyond the authority of the grand jury.[6]

The author contended that since the grand jury's inquiry into his representations necessarily involved an investigation into the truth of the contents of his book, the subpoena violated the first amendment[7] and a federal common law privilege for materials relating to a book.[8] In *In re Grand Jury Matter (Gronowicz)*,[9] the Third Circuit, sitting in banc,[10] concluded that the author, Antoni Gronowicz, could be prosecuted under the Federal Mail Fraud Statute for misrepresentations about the contents of his book, *God's Broker: The Life of John Paul II (God's Broker)*.[11]

6. *Id.* at 985. For a discussion of the grounds of the author's defense, see *infra* notes 27-28 and accompanying text.

7. 764 F.2d at 985. For a discussion of the author's first amendment claim, see *infra* note 24 and accompanying text.

8. 764 F.2d at 985. For a discussion of the author's contention that a federal common law journalists' privilege protects him from compliance with the subpoena, see *infra* note 25 and accompanying text.

9. 764 F.2d 983 (3d Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 793 (1986).

10. Rules of Appellate Procedure allow for a case to be heard by all Circuit Judges. FED. R. APP. P. 35. Rule 35 authorizes a Circuit court to order a case to be heard or reheard in banc when "[a] majority of the circuit judges who are in regular active service" vote in favor of such, provided such "is necessary to secure or maintain uniformity of its decisions, or . . . the proceeding involves a question of exceptional importance." *Id.* Additionally, according to the Third Circuit's internal operating procedures:

> Initial in banc hearing ordinarily is ordered by a majority of the active judges only if there is a determination that the case is controlled by a prior decision of the court which should be reconsidered or the case is of such great importance as to require initial consideration by the full court.
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> . . . .
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> Rehearing in banc is not favored and ordinarily will not be ordered except
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> (1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or
>
> (2) where the proceeding involves a question of exceptional importance.
>
> This Court does not ordinarily grant rehearing in banc where the panel's statement of law is correct and the controverted issue is solely the application of the law to the circumstances of the case.
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> It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court.
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> The need to accelerate a case scheduled for in banc hearing will be determined by majority vote of the court. However, it is the policy of the court to hold an in banc hearing only at a regularly scheduled in banc session of the court.

Rules of Appellate Procedure, United States Court of Appeals for the Third Circuit, 28 U.S.C. App. 1, ch. VIII (1986).

11. 764 F.2d at 989. Thus, the Third Circuit held the subpoena *duces tecum* valid and affirmed the contempt order against Gronowicz. *Id.*

Six opinions were written in *Gronowicz*: three for affirmance; three in dissent.[12] This case brief will review each of the six opinions and the case law supporting their positions.[13] Further, this casebrief will compare and analyze the *Gronowicz* opinions in an attempt to discern a grand jury's powers where criminal prosecutions for fraud involve an investigation into the truth or falsity of a book.

II. THE *GRONOWICZ* DECISION

The book, *God's Broker*, purported to recount "the life of Pope John Paul II as told in his own words and in the reminiscences of cardinals, bishops, and friends."[14] After the book was published and distributed, however, Richardson & Snyder, the publisher of *God's Broker*, received information indicating that Gronowicz had never interviewed the Pope.[15] As a result, Richardson & Snyder withdrew *God's Broker* from publication.[16] Thereafter, the government instituted a grand jury inves-

12. Judge Gibbons wrote the majority opinion. *Id.* at 984. Judges Garth and Becker wrote concurring opinions. *Id.* at 989 (Garth, J., concurring); *id.* at 990 (Becker, J., concurring). Judges Hunter, Higginbotham, and Sloviter issued dissenting opinions. *Id.* at 992 (Hunter, J., dissenting); *id.* at 994 (Higginbotham, J., dissenting); *id.* at 1000 (Sloviter, J., dissenting). Chief Judge Aldisert, and Judges Seitz, Adams, Hunter, Weis, and Mansmann voted with the majority without issuing separate opinions. *Id.* at 984.

13. For a discussion of Judge Gibbons' opinion for the majority, see *infra* notes 27-55 and accompanying text. For a discussion of Judge Becker's concurring opinion, see *infra* notes 62-70 and accompanying text. For a discussion of Judge Garth's concurring opinion, see *infra* notes 56-62 and accompanying text. For a discussion of Judge Hunter's dissenting opinion, see *infra* notes 63-70 and accompanying text. For a discussion of Judge Higginbotham's dissenting opinion, see *infra* notes 71-111 and accompanying text. For a discussion of Judge Sloviter's dissenting opinion, see *infra* notes 111-116 and accompanying text.

14. 764 F.2d at 985 (quoting the dust jacket of A. GRONOWICZ, GOD'S BROKER: THE LIFE OF JOHN PAUL II). The book contains numerous quotations that the author attributes to the Pope and various Vatican officials. *Id.* In the prologue to *God's Broker*, Gronowicz claimed to have gathered his information "from private conversations in Europe and America with Pope John Paul II, Cardinals and other high officials of the Roman Catholic Church, as well as with the cultural and political personages of Poland." *Id.* (quoting *Prologue* to A. GRONOWICZ, GOD'S BROKER). Gronowicz further stated that Cardinal Wyszynski, Primate of Poland, introduced him to Pope John Paul II and convinced the Pope to grant Gronowicz private interviews without going through the Vatican Department of State. *Id.*

15. *Id.* Prior to publication, John Cardinal Krol, the Cardinal of the Archdiocese of Philadelphia, gave *God's Broker* a favorable endorsement. *Id.* Soon after the book went on sale, however, Cardinal Krol retracted his endorsement. *Id.* Richardson & Synder received information suggesting "that Gronowicz never interviewed the Pope, and had met him only once or twice as a member of a general audience." *Id.*

16. *Id.* It should be noted that the principal partners of Richardson & Synder disagreed over the authenticity of *God's Broker*. This was a factor in the subsequent dissolution of the publishing firm. Reply Brief of Amici Curiae, The American Civil Liberties Foundation and the Authors League of America, Inc. at 2, *In re* Grand Jury Matter (Gronowicz), 764 F.2d 985 (3d Cir. 1985), *cert. denied*,

tigation into mail and wire fraud violations premised on the fraudulent representations Gronowicz allegedly made to the publisher regarding the contents of *God's Broker*.[17] During the grand jury investigation, the government served Gronowicz with a subpoena *duces tecum* that requested production of his source material and other documents pertaining to the writing of *God's Broker*.[18] Through examination of these documents, the government sought to determine whether Gronowicz had interviewed and spoken with ranking clerical and state officials, which he represented as being the foundation of *God's Broker*.[19]

Gronowicz made a motion to quash the subpoena *duces tecum*, objecting to enforcement of the subpoena on four grounds: "(1) that it sought information that was within the protection of the Pennsylvania Shield Law . . .; (2) that it was burdensome, oppressive, and unreasonable; (3) that the information was sought for an improper purpose because the grand jury's investigation was prohibited by the first amendment; and (4) that the state of Gronowicz's health precluded his personal appearance."[20] The district court denied the motion to quash

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106 S. Ct. 793 (1986). One partner, Julian Snyder, believed that the book was a fake and instituted a civil fraud action against Gronowicz. 764 F.2d at 985. Additionally, Gronowicz brought a civil action against Thomas Leonard, the purchaser of the movie rights to *God's Broker*, for breach of contract. Reply Brief of Amici Curiae at 3. In a counterclaim, Leonard "directly raises the issue of the book's validity." *Id.*

17. 764 F.2d at 985. The grand jury's investigation focused on whether Gronowicz defrauded Richardson & Synder into publishing his book and Thomas Leonard into contracting for the rights to produce the movie version of the book in violation of the mail and wire fraud statutes. *Id.* In particular, the government alleged that Gronowicz fraudulently represented that the claims made in *God's Broker* were true, when, in fact, the interviews and conversations with the Pope and Vatican officials never occurred. *Id.* For a discussion of the mail and wire fraud statutes, see *supra* notes 1-3 and accompanying text.

18. *Id.* at 984. The government's subpoena sought production of "[a]ny and all notes, recordings (mechanical or otherwise), or other record, made by any means, containing, verbatim or in substance, the statements of Pope John Paul II . . . *as contained in the book*." *Id.* at 995 (Higginbotham, J., dissenting) (emphasis supplied by Judge Higginbotham). The subpoena also requested that Gronowicz produce his travel records, passports, and appointment books. *Id.*

19. *Id.* at 992 (Hunter, J., dissenting). In support of its subpoena, the government submitted an affidavit to the district court in which it averred "that a 'representative of the Vatican' stated that Gronowicz had not had two hundred hours of conversation with the Pope, that he had asked for but had been denied a private audience with the Pope, and that he had been admitted one or two times in a group or general audience." *Id.* at 991 (Becker, J., concurring). Additionally, the government submitted a separate affidavit that contained the sworn statements of Wladyslaw Cardinal Rubin of the Vatican Secretariat, confirming the anonymous tip; however, the district court did not consider this affidavit when it denied the motion to quash the subpoena. *Id.* at 991 n.1. (Becker, J., concurring).

For a discussion of the standards of proof required in an affidavit, see *infra* note 38 and accompanying text.

20. 764 F.2d at 984-85 (citation omitted). The motion to quash the subpoena was made pursuant to Rule 17(c) of the *Federal Rules of Criminal Procedure*

the subpoena,[21] and ultimately held Gronowicz in civil contempt.[22] On appeal, the only issue before the Third Circuit was whether the information sought by the subpoena was for an improper purpose.[23] Gronowicz contended that the mail fraud investigation was beyond the scope of a grand jury's power because it necessarily involved an inquiry into the veracity of the contents of *God's Broker* in violation of the press and religion clauses of the first amendment.[24] Additionally, Gronowicz claimed a federal common law privilege protecting journalists from producing

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which provides in pertinent part: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c).

21. 764 F.2d at 984. The court denied the motion but required that the government modify its subpoena to identify the requested documents with more specificity. *Id.*

22. *Id.* Additionally, the district court ordered Gronowicz to pay a five hundred dollar per day fine while he remained in contempt. *Id.* Payment of the fine was stayed pending the Third Circuit's decision. *Id.*

23. *Id.* at 985. The district court ruled that Gronowicz did not have to appear before the grand jury due to his ill-health. *Id.* Further, Gronowicz did not challenge the district court's finding that the documents subject to the subpoena were not protected by the Pennsylvania Shield Law nor the finding that the subpoena was not unreasonably burdensome. *Id.*

24. *Id.* at 985. Gronowicz contended that "[g]overnmental investigation into the truth of the contents of a religious subject is an unprecedented abridgement of the first amendment." Brief for Appellant at 5, *In re* Grand Jury Matter (Gronowicz), 764 F.2d 983 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 793 (1986). Gronowicz also argued that a "[c]riminal investigation by the government into the truth of a book unconstitutionally abridges the first amendment." *Id.* Further, although *God's Broker* was primarily a secular biography on the life of an important international figure, Gronowicz asserted that his book was an "exposition [which includes his] views on important religious issues" thereby implicating the free exercise clause of the first amendment. *Id.* at 10. Gronowicz also argued that a "governmental investigation of the truth of a book about the affairs of a church which is instigated by a person with purported allegiances to that church, constitutes a dangerous entanglement by the government in an essentially religious dispute." *Id.* at 11. In the affidavit supporting its subpoena directed at Gronowicz, the government incorporated an anonymous tip by a "representative of the Vatican" which stated that Gronowicz had not conversed with the Pope for two hundred hours, that he had been denied a private audience with the Pope, and that he had been admitted one or two times in a group audience. 764 F.2d at 991 (Becker, J., concurring). Gronowicz stressed that the dispute over the book's accuracy was between himself and the Vatican and, therefore, governmental intervention into the dispute violated the "establishment clause" of the first amendment. Brief for Appellant at 11. By investigating the possible mail fraud based on the falsity of the book's contents, Gronowicz noted, the government was essentially substantiating the Vatican's charge of inaccuracy and fraud. *Id.* Consequently, "the 'establishment' clause is violated by an investigation which favors or seeks to vindicate the view of one party to [a religious] dispute, particularly if the governmentally favored party has not taken any independent civil action in support of its ostensible grievances." *Id.*

For a discussion of the majority's treatment of Gronowicz's "freedom of religion" argument, see *infra* notes 51-54 and accompanying text.

materials "relating to the writing of a book."[25] Gronowicz did not assert a fifth amendment right against self incrimination on the ground that reliance on the fifth amendment would undercut his first amendment rights.[26]

A. *Judge Gibbons' Majority Opinion*

Judge Gibbons, in deciding whether the information sought by the subpoena *duces tecum* was for a proper grand jury investigation, first addressed Gronowicz's contention that he possessed a federal common law privilege, analogous to the journalists' privilege,[27] that protects materials relating to the veracity of a book in grand jury proceedings.[28] Judge Gibbons initially noted that the journalists' privilege, as exemplified by typical press shield laws,[29] merely conceals a journalist's confi-

25. 764 F.2d at 985. Gronowicz contended that "there is a federal common law privilege analogous to the journalists' privilege . . . that protects an author from compelled disclosure to a grand jury of information concerning the truth of representations of fact made about the contents of a book." *Id.* at 985-86.

26. Brief for Appellant at 19-21. In his brief, Gronowicz espoused the belief that:

> . . . the Fifth Amendment . . . is ineffective in protecting the First Amendment interests infringed by the government's conduct. The First Amendment guarantees the freedom to speak without the fear, chill, or encumbrance of possibly being required subsequently to justify that speech to the government or to defend the accuracy of that speech in a government investigation. These First Amendment guarantees would be undermined if the government could . . . pressure the citizen into invoking the Fifth Amendment . . . [thereby] implicitly impugning the very speech under investigation. If a citizen were not constitutionally entitled . . . to rely on the First rather than the Fifth Amendment, governmental inquiry into speech would be dangerously encouraged because the governmental power to discredit protected expression would be substantially increased. . . . [In this manner], the citizen would be forced either to succumb to the harassments, intimidations, and risks of permitting the government to delve into the predicates of his free expression . . . , or to forfeit First Amendment protections . . . by relying on his Fifth Amendment privilege, thereby permitting the government to succeed indirectly in its endeavor to discredit the speech under investigation.

Id. at 20-21. For a discussion of views on Gronowicz's fifth amendment right, see *infra* note 59 and accompanying text.

27. 764 F.2d at 986. For a general discussion of the journalists' privilege, see Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970).

28. 764 F.2d at 985-86.

29. *See, e.g.*, Pennsylvania Shield Law, 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982). The Pennsylvania Shield Law provides:

> (a)—General rule.—No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any infor-

dential sources of published information when the journalist is called to testify in proceedings against third parties.[30] This privilege, Judge Gibbons concluded, does not protect an author from disclosure of information to a grand jury regarding "representations of fact made about the contents of a book."[31] Further, the majority stated that the press privilege is a qualified privilege which can yield to "the compelling governmental interest in investigation of crime."[32]

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mation procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

(b) Exception.—The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

Id.

30. *Id.* at 986 (comparing United States v. Criden, 633 F.2d 346, 350 (3d Cir. 1980) (journalist who had published a story containing an account of defendant's involvement in ABSCAM called to testify as to the validity of a self-confessed source has limited privilege not to disclose the source), *cert. denied*, 449 U.S. 1113 (1981); United States v. Cuthbertson (Cuthbertson II), 651 F.2d 189, 191 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981); United States v. Cuthbertson (Cuthbertson I), 630 F.2d 139 (3d Cir. 1980) (defendants, indicted by a federal grand jury on charges of fraud and conspiracy soon after a C.B.S. "60 Minutes" broadcast concerning their fast-food organization, served C.B.S. with a subpoena demanding production of all reporters' notes, file "out takes," audiotapes, and transcripts of interviews prepared in connection with the "60 Minutes" program must establish that their need for the information extinguishes the journalists' limited privilege against compelled disclosure), *cert. denied*, 449 U.S. 1126 (1981); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979) (plaintiff, who called reporter as a witness in a civil action, and who sought to prove defendants were source of story about plaintiff's job performance as chief of police, must establish that the need for the information outweighs the journalists' limited privilege against compelled disclosure).

31. 764 F.2d at 985-86. The majority, however, offered no explicit reason why the privilege protecting journalists from revealing confidential sources when they are called to testify in third party proceedings should not cover proceedings in which the target of the investigation is the journalist/author himself. *But see id.* at 998-1000 (Higginbotham J., dissenting) (an author possesses a privilege similar to the limited journalists' privilege in a proceeding directed against the author).

32. 764 F.2d at 986. *But see id.* at 993 (Hunter, J., dissenting) ("Here the mail and wire fraud alleged . . . is inextricably meshed with the contents of the book . . . the government has not set forth an independent compelling interest—other than an interest in preventing the fraud of false statements in the book . . . ."). For a discussion of Judge Hunter's dissenting opinion, see *infra* notes 71-87 and accompanying text. The Third Circuit, on other occasions, has held that the journalists' privilege is qualified. *See, e.g.*, United States v. Criden, 633 F.2d 346, 356 (3d Cir. 1980) ("When no countervailing constitutional concerns are at stake, it can be said that the [journalists'] privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits."), *cert. denied*, 449 U.S. 1113 (1981); United States v. Cuthbertson (Cuthbertson II), 651 F.2d 189, 191 (3d Cir.) (a journalist possesses a qualified privilege not to disclose sources when called to testify in criminal cases which may yield to the overriding interest

Judge Gibbons relied on the Supreme Court's decisions in criminal and civil defamation cases to find that an author is not absolutely free from inquiry into his alleged falsehoods, whether the investigation is pre- or post-publication.[33] Relying on *Herbert v. Lando*,[34] in which the

in a defendant's right to a fair trial), *cert. denied*, 454 U.S. 1056 (1981). Other circuits have likewise extended to journalists a limited privilege against disclosure. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977) (to determine whether a journalists' privilege must yield to a party's need for discovery in third party proceedings, a court must apply a balancing test in which it examines such factors as the nature of the evidence sought, the relevance of such evidence, the need of the party seeking the evidence, and the extent to which the information may be obtained by other sources); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) (journalists possess a limited first amendment privilege which yields to a defendant's sixth amendment right to a fair trial), *cert. denied*, 427 U.S. 912 (1976); Baker v. F. & F. Investment, 470 F.2d 778, 783 (2d Cir. 1972) ("[T]hough a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances . . . in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony."), *cert. denied*, 411 U.S. 966 (1973); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (to extinguish an asserted first amendment privilege, the government has the burden of showing that it has an "immediate, substantial and subordinating" need for the information, that the information is significantly related to the investigation in which the government has an interest, and that the means of getting the information is not excessive); United States v. Hubbard, 493 F. Supp. 202, 205 (D.D.C. 1979) ("[R]eporter's privilege will be upheld unless the information sought is necessary to a just resolution of the case, and . . . cannot be obtained by alternative means."); Gilbert v. Allied Chemical Corp., 411 F. Supp. 505, 510 (E.D. Va. 1976) ("[T]he first amendment requires that newsmen be given a privilege against revealing their confidential sources that may be abrogated only by a showing . . . , that [the] only practical access to crucial information necessary for the development of the case is through newsman's sources.").

33. 764 F.2d at 986 (citing Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . includ[ing] the lewd and obscene, the profane, the libelous, and the insulting . . ."); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976) (when called to account for "inaccurate and defamatory reports of fact, [which] deserv[e] no First Amendment protection" and are written about private individuals, the constitutionally protected interests of the press are safeguarded so long as liability is not imposed without fault); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) ("so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) ("a 'public figure' . . . may . . . recover damages for a defamatory falsehood . . . on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers"); New York Times v. Sullivan, 376 U.S. 254, 283 (1976) (a state may constitutionally "award damages for libel in actions brought by public officials against critics of their official conduct," so long as actual malice is shown)).

34. 441 U.S. 153 (1979).

Supreme Court held that the first amendment does not prohibit discovery into a defendant's editorial process in a defamation action,[35] Judge Gibbons concluded that post-publication discovery of an author's activities is not limited by an absolute privilege.[36] Rather, the majority found that the scope of a grand jury inquiry is established by *In re Grand Jury Proceedings (Schofield)*.[37]

Under the "*Schofield* rule," the government must submit an affidavit which demonstrates that the items sought by the subpoena are: "(1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose."[38] Noting that

35. *Id.* In *Herbert*, Columbia Broadcast Systems, Inc. (C.B.S.) broadcasted a report on Anthony Herbert, a Vietnam Veteran, who had accused his superiors of misconduct during the war. *Id.* at 155-56. The program was edited and produced by Barry Lando and narrated by Mike Wallace. *Id.* at 156. Herbert subsequently instituted a suit alleging that the show and an article written by Lando based on the show "falsely and maliciously portrayed him as a liar and a person who had made war-crimes charges to explain his relief from command." *Id.* Through use of deposition, Herbert sought to establish the writers' and publishers' state of mind at the time of broadcast. *Id.* at 157. Lando refused to answer the questions "on the ground that the First Amendment protected against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process." *Id.* The Supreme Court refused to recognize the defendant's asserted press privilege absolutely barring discovery into the program's editorial process because an element of the plaintiff's defamation case was the defendants' state of mind. *Id.* at 169-70. The Court reasoned that if the Court in *New York Times Co. v. Sullivan* had considered an author's editorial process to be beyond discovery, it would not have required a showing of actual malice. *Id.* at 170 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 285-286 (1964)). The *Herbert* Court, therefore, concluded that a plaintiff in a civil defamation action must be permitted to seek documents used by publishers during the editorial process in order to determine whether the publisher had grounds to believe the truth of the article he was publishing. *Id.* at 169-70. The Court found the extent of allowable discovery governed by Rule 26(b)(1) of the Federal Rules of Civil Procedure. *Id.* at 176-77 (citing FED. R. CIV. P. 26(b)(1)).

36. 764 F.2d at 986.

37. *In re* Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); *In re* Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975). *See also Gronowicz*, 764 F.2d at 986. In the *Schofield* cases, Schofield, a grand jury witness, received a subpoena commanding her to appear and testify before a grand jury. *Schofield I*, 486 F.2d at 87. The order "contain[ed] no . . . information about the nature or purpose of the proceeding." *Id.* When Schofield appeared, she was not asked to testify; rather, she was requested "(1) to submit handwriting exemplars, and (2) to allow her fingerprints and photograph to be taken." *Id.* She refused and was held in contempt. *Id.* at 88.

Schofield did not claim constitutional immunity from testifying, but rather challenged the grand jury's absolute power to issue blind subpoenas without stating the reason for requesting the items sought. *Id.* After deciding that the government must "make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought for another purpose," the Third Circuit remanded the case to the district court. *Id.* at 93-94.

38. 764 F.2d at 986 (quoting *Schofield II*, 507 F.2d at 966). In *Schofield*, the Third Circuit outlined the minimal requirements a grand jury must follow when issuing a subpoena. *Schofield I*, 486 F.2d at 93, *Schofield II*, 507 F.2d at 966.

only the third element was at issue in *Gronowicz*,[39] Judge Gibbons reiterated his reliance on *Herbert* and stated that the subpoena *duces tecum* was issued for a proper purpose "[i]f the grand jury can constitutionally inquire into culpable falsehood by an author . . . ."[40]

Gronowicz contended that absent a compelling governmental interest which is protected through a means narrowly drawn,[41] the right of free expression embodied in the first amendment prohibits a prosecution for misrepresenting the contents of a book.[42] Even though the grand jury investigation presumably focused on the representations made by Gronowicz to his publisher, Judge Gibbons conceded that the inquiry would necessarily examine the truth or falsity of the contents of *God's Broker*.[43] The majority, however, refused to employ the standard of a compelling governmental interest and a means narrowly drawn requested by Gronowicz stating that such standard was applicable only to prior restraints upon speech.[44] Unlike prior restraints which impose re-

39. 764 F.2d at 986. Gronowicz did not challenge the government's assertion that the subpoenaed items were relevant to the grand jury's investigation and properly within the grand jury's jurisdiction. *Id.* He did argue that the third prong of the *Schofield* rule was not met because the first amendment bars inquiry into the truth of an author's work; thus the subpoenaed items, comprised of his source materials, were not sought for a proper grand jury investigation. *Id.*

40. *Id.* Judge Gibbons noted that the Supreme Court in *Herbert* refused to extend first amendment protection of published speech to such a degree that the effect of publication would be to insulate an author's "culpable falsehoods" from discovery in a civil action for defamation. *Id.* (citing *Herbert*, 441 U.S. at 170). Discovery in civil cases is not limited by any absolute first amendment privilege which would bar inquiry into "a reporter's thoughts, opinions, and conclusions with respect to materials gathered by him," but rather by Rule 26(b)(1) of the Federal Rules of Civil Procedure. *Id.* Just as the first amendment does not limit discovery into culpable falsehoods in a civil action for defamation, Judge Gibbons reasoned that the first amendment does not limit "discovery" into culpable falsehoods in a grand jury investigation. *Id.* Rather, the limits of a grand jury's inquiry into the editorial process of an author are governed by the *Schofield* rule. *Id.*

For a discussion of *Herbert*, see *supra* notes 34-35 and accompanying text.

41. 764 F.2d at 986.

42. *Id.* at 987. The Third Circuit noted the absence of any case law directly supporting Gronowicz's position; however, Gronowicz "relie[d] on repeated statements by the Supreme Court in other contexts extolling the social utility of free expression." *Id.*

43. *Id.*

44. *Id.* Judge Gibbons found that the mail fraud investigation necessarily examined the accuracy of the contents of *God's Broker* because the representations made by Gronowicz to the publisher and movie producer repeated the alleged basis of *God's Broker*. *Id.* The majority believed, however, that the inquiry into the truth of *God's Broker* was incidental to the primary focus of the grand jury investigation—the truth of representations made by Gronowicz regarding the contents of *God's Broker*. *Id.* *But see id.* at 992 (Hunter, J., dissenting) ("[T]he Government's own concession [is] that the focus of the grand jury investigation was on the truth or falsity of the book itself."); *id.* at 995 (Higginbotham, J., dissenting) ("I think it is beyond peradventure that this is an investigation into the truthfulness of the contents of *God's Broker* . . . we give appellant's first

strictions on the dissemination of speech,[45] the majority reasoned, the

amendment contentions grievously short shrift if our analysis pretends that this investigation does not implicate the contents of published speech, but rather . . . 'misrepresentations about the contents' of published speech.").

Both Gronowicz and the *Amici Curiae* argued in their briefs that the mail fraud investigation was not viewpoint-neutral but rather an unprecedented attempt by the government to "inject itself into a dispute over the validity of a book that deals with an important public issue." *See* Brief of the *Amici Curiae*, The American Civil Liberties Foundation and the Authors League of America, Inc. at 9, *In re* Grand Jury Matter *(Gronowicz)*, 764 F.2d 983 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 793 (1986). *See also* Brief for Appellant at 11-15. The court rejected this argument, concluding that the investigation was viewpoint-neutral. 764 F.2d at 987 n.3. The majority noted, however, that if the record had raised doubts as to the neutrality of the investigation, "serious first amendment concerns" would be implicated. *Id.*

45. 764 F.2d at 987 (citing Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Beneficial Corp. v. F.T.C., 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); New Jersey State Lottery Commission v. United States, 491 F.2d 219 (3d Cir. 1974) (*in banc*), *vacated and remanded for determination of mootness*, 420 U.S. 371 (1975); Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972)). Prior restraints of speech are unconstitutional except in limited, narrowly defined situations. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). In *New York Times*, the government sought to enjoin the publication of "the Pentagon Papers," which contained "a classified study entitled 'History of U.S. Decision-Making Process on Viet Nam Policy' " in the New York Times and the Washington Post. *Id.* at 714. The Supreme Court recognized that "[a]ny system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity. . . . [and] thus [the government] carries a heavy burden of showing justification for the imposition of such a restraint . . . ." *Id.* (citing Organization For a Better Austin v. Keefe, 402 U.S. 415, 419 (1972); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). The Court therefore held that the government had not met that burden and denied the government's request for injunctive relief. *Id.* Justice Black, joining with the Court in *New York Times*, interpreted the first amendment as barring all prior restraints on free speech. *See id.* at 714-20 (Black, J., concurring). According to Justice Black, "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *Id.* at 717 (Black, J., concurring). Concurring with Justice Black, Justice Douglas noted that:

> [t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be.

Id. at 724 (Douglas, J., concurring) (citing T. EMERSON, THE SYSTEM OF FREE EXPRESSION, c. V. (1970); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES, c. XIII (1941)). Justice White, joined by Justice Stewart, concurred in the result reached by the Court "because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system." *Id.* at 730-31 (White, J., concurring). Justice White went on, however, to note that the first amendment protection extended to the pre-publication period does not extend to the post-publication period. *Id.* at 733-34 (White, J., concurring). According to Justice White:

> terminating the ban on publication of the relatively few sensitive docu-

mail fraud investigation against Gronowicz was a post-publication restriction which implicated the first amendment concerns for the potential chilling effect upon authors if they "could be called to account for a conscious falsehood about the contents of a book."[46]

In place of the prior restraint test, the *Gronowicz* court stated that the first amendment interests implicated by post-publication restrictions "must be balanced against the societal interest in protecting others from the harm of defamation."[47] Judge Gibbons commented that in libel

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ments the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication.

Id. at 733 (White, J., concurring).

Thus, while the constitutional mandate that no prior restraint be placed on speech is not absolute, the burden is on the government to justify the restraint. *See generally id.* at 713 (per curiam); *id.* at 724-27 (Brennan, J., concurring); *id.* at 727-30 (Stewart, J., concurring); *id.* at 730-40 (White, J., concurring); *id.* at 740-48 (Marshall, J., concurring). The protection granted speech through the doctrine of prior restraints yields to a law designed to further a compelling governmental interest or objective as long as the law is narrowly drawn and rationally related to the achievement of that interest or objective. *See, e.g.*, Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977). In *Linmark*, the Supreme Court invalidated a local ordinance that prohibited the posting of "For Sale" or "Sold" signs in front of homes in order to prevent "the flight of white homeowners from a racially integrated community." *Id.* at 86. While recognizing that the municipality had a valid interest in preserving the integrated character of the neighborhood, the Court nonetheless found this goal could be achieved in ways which would not curtail the flow of information. *Id.* at 95-97. Further, the Court questioned the relationship between the existence of the signs and the perceived exodus of white homeowners from Willingboro. *Id.* at 95. Absent a finding that the statute was narrowly drawn and rationally related to a compelling governmental interest, the Supreme Court invalidated the ordinance. *Id.* at 95-97; *see also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (city human relations ordinance prohibiting newspapers from publishing want-ads by sex-preference is a significant interest and therefore a constitutionally permissible restraint on free speech); Bates v. City of Little Rock, 361 U.S. 516 (1960) (where there is a significant encroachment upon personal liberty, the state may prevail only upon a showing of a subordinate compelling interest); Thomas v. Collins, 323 U.S. 516 (1945) (laws restricting free speech must be justified in light of a clear public interest and must bear a substantial relationship to the evil they are designed to curtail); New Jersey State Lottery Comm'n v. United States, 491 F.2d 219 (3d Cir. 1974) (en banc) (prior restraint incidental to achievement of valid government purpose permissible under first amendment), *vacated and remanded for a determination of mootness*, 420 U.S. 371 (1975); Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, 459 F.2d 676 (3d Cir.) (first amendment does not necessarily prohibit prior restraints which serve a valid government purpose), *cert. denied*, 409 U.S. 933 (1972).

46. For a discussion of the law governing regulations which impose a prior restraint on dissemination of information, see *supra* note 45.

47. 764 F.2d at 988. The mail fraud statute, the court observed, does not prohibit dissemination of information but rather "chills" an author's first

cases this balancing is accomplished implicitly through the scienter requirements and, where a false statement is made intentionally, it is not afforded any first amendment protection from a post-publication sanction.[48] Finding no reason to distinguish between fraud and libel for first amendment purposes since the scienter requirements of the mail and wire fraud statutes are "at least as strict" as the "constitutional minimum for libel,"[49] Judge Gibbons concluded that the mail fraud investi-

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amendment rights because of the threat of post-publication criminal prosecution for falsehoods. *Id.* at 987. Thus, the law of prior restraints "provide[d] at best limited enlightenment" in *Gronowicz*. *Id.*

48. *Id.* at 987-88. The Third Circuit conceded that post-publication sanctions inhibit the free flow of speech; however, it noted that the Supreme Court "has consistently refused to strike down libel laws imposing post-publication sanctions." *Id.* at 987 (citing Herbert v. Lando, 441 U.S. 153 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964)). Further, while the Court in *Near* expressly struck down laws that imposed prior restraints on the free flow of information by authorizing injunctions against speech found to be a public nuisance, the Court went on to find that post-publication criminal punishment of the press for abusing its first amendment privilege was permissible because such prosecution is "essential to the protection of the public." Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 715 (1931).

49. 764 F.2d at 988.

The common law principle that untrue speech was afforded absolutely no protection existed until the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Prior to *Sullivan*, libelous statements were considered outside the realm of constitutionally protected speech. *See Herbert*, 441 U.S. at 158 (citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1962); Roth v. United States, 354 U.S. 476, 482-83 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 707-08 (1931)). In *Sullivan*, the first in a line of Supreme Court cases to apply first amendment limitations to civil defamation actions, the New York Times (Times) was sued for civil defamation over an advertisement which appeared in the Times. 376 U.S. at 256. The plaintiff, not named in the advertisement, sued in his official capacity. *Id.* at 258. While much of the information in the advertisement was false, the Times offered evidence that it had no reason to believe that the statements listed in the advertisement were untrue, although no one had checked the veracity of its contents. *Id.* at 261. The Supreme Court acknowledged the potential threat of self-censorship by the press arising out of laws permitting criminal and civil actions to be maintained for unintentional defamation; thus, it sought to bring libel laws into harmony with the first amendment. *Id.* at 269-70. The Court noted that the first amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). Recognizing the need to protect even some false speech in order to foster the unfettered growth of political debate in a climate free from fear of retaliation, the Court concluded that libel laws must be restricted according to first amendment principles. *Id.* at 270. The Court achieved this harmony by holding that for an author to libel a public official, it must be shown that the author knew the published statements were false or acted in reckless disregard of probable falsehood. *Id.* at 279-80.

Thus, while defamation actions are not barred by the first amendment, the requirement of actual malice protects the first amendment guarantee of free speech. *But see id.* at 293 (Black, J., concurring) ("The requirement that malice be proved provides at best an evanescent protection for the right critically to

gation against Gronowicz was not prohibited by the first amendment.[50]

discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."); *id.* at 298 (Goldberg, J., concurring in result) ("[T]he First and Fourteenth Amendments to the Constitution afford to citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.")

The first amendment protection given to false speech however, is limited by an individual's interest in protecting his reputation. *See Herbert*, 441 U.S. at 169. Thus, the Supreme Court in *Gertz v. Robert Welch*, concluded that "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation . . ., the *New York Times* privilege for defamation of public officials and its extension to public figures [is] wholly inapplicable to the context of private individuals." Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-49 (1974). In order for a private individual to recover punitive damages, which "compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," the *New York Times* standard must be met. *Id.* at 349. The first amendment protection afforded speech is not absolute. Recognizing that "the common law of libel gave insufficient protection to the first amendment guarantees of freedom of speech and freedom of press," the Supreme Court attempted to balance society's interest in freedom from defamation against the need to avoid the imposition of self-censorship on the dissemination of truthful information. *Herbert*, 441 U.S. at 159 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964)). The *Herbert* Court achieved this balance by requiring that "liability for damages [in defamation cases] be conditioned on the specified showing of culpable conduct by those who publish damaging falsehood." *Id.*

50. 764 F.2d at 988 (citing United States v. Boyer, 694 F.2d 58 (3d Cir. 1982); United States v. Pearlstein, 576 F.2d 531 (3d Cir. 1978); United States v. Klein, 515 F.2d 751 (3d Cir. 1975)). Judge Gibbons commented that "[i]n both libel and fraud, post-publication sanctioning occurs because of a falsehood made with the requisite state of mind." *Id. But see id.* at 992 (Hunter, J., dissenting); *id.* at 1001 (Sloviter, J., dissenting). For a discussion of Judge Hunter's dissent, see *infra* notes 71-87 and accompanying text. For a discussion of Judge Sloviter's dissent, see *infra* notes 112-116 and accompanying text.

It should be noted that the cases cited by the Third Circuit did not deal with first amendment challenges to the mail fraud statute. In *Klein*, the defendant was indicted for conspiracy to defraud his insurance company by mail. 515 F.2d at 752. The Third Circuit overturned his conviction for mail fraud because the government failed to show that the defendant had the specific intent to defraud. *Id.* at 757-58. Although the court found circumstantial evidence sufficient to infer knowledge of specific intent, the court concluded that unless the defendant had actual knowledge of the conspiracy, intent was lacking. *Id.* at 754-58.

In *Boyer*, the defendant was charged with mail fraud and securities violations stemming from fraudulent statements about the amount of profit an enterprise would ultimately produce. 694 F.2d at 60. The Third Circuit required proof that the defendant knew that the representations he was making were untrue, and that he acted with the intent to defraud or that the statements were recklessly made to induce reliance. *Id.* at 59. These two Third Circuit cases are in accord with the cases in the majority of circuits which require intent or recklessness as an essential element of mail fraud. *See, e.g.*, United States v. Gelb, 700 F.2d 875, 879 (2d Cir.) (prosecution must prove mails were knowingly used to further scheme to defraud in order to sustain conviction for mail fraud), *cert. denied*, 464 U.S. 853 (1983); United States v. Barta, 635 F.2d 999, 1005 n.14 (2d Cir. 1980) (mail fraud statute prohibits actual frauds which are intentional as opposed to constructive frauds which involve breaches of fiduciary or equitable duties without intent to deceive), *cert. denied*, 450 U.S. 998 (1981); United States

The *Gronowicz* court also noted that prior decisions upholding the mail fraud statute from challenges based on the religion clauses of the first amendment were in accord with its decision.[51] In *United States v. Ballard*,[52] the Supreme Court held that knowingly misrepresenting religious beliefs pursuant to a fraudulent scheme was actionable under the mail fraud statute.[53] As with *Ballard*, the Third Circuit stated, Gronowicz could be prosecuted for knowingly misstating the contents of

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v. Kent, 608 F.2d 542, 545 n.3 (5th Cir. 1979) ("An implicit element of the mail fraud statute is a specific intent to commit fraud"), *cert. denied*, 446 U.S. 936 (1980); United States v. Bryza, 522 F.2d 414, 421 (7th Cir. 1975) (government must prove beyond a reasonable doubt defendants acted with specific intent to defraud), *cert. denied*, 426 U.S. 912 (1976); United States v. McGregor, 503 F.2d 1167, 1171 (8th Cir. 1974) (specific intent to defraud is essential to finding of guilt under mail fraud statute), *cert. denied*, 420 U.S. 926 (1975); United States v. Payne, 474 F.2d 603, 604 (9th Cir. 1973) (mail fraud statute requires specific intent to defraud).

51. 764 F.2d at 988 (citing United States v. Ballard, 322 U.S. 78 (1944); United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982)).

52. 322 U.S. 78 (1944). In *Ballard*, defendant was indicted for mail fraud on the grounds that "certain designated corporations were formed, literature distributed and sold, funds solicited, and memberships in the "I am" movement sought 'by means of false and fraudulent representations, pretenses and promises.'" *Id.* at 79. Defendant Ballard, "alias Saint Germain, Jesus, George Washington, and Godfrey Ray King," represented to others that he had been sent by Saint Germain to teach the ways of the "I am" movement and that he had the power to cure diseases. *Id.* at 79-80. It was alleged that defendants knew the representations they were making were false and "were made with the intention . . . to cheat, wrong, and defraud persons . . . and to obtain from persons . . . money, property, and other things of value . . . [for] the benefit of the defendants." *Id.* at 80. Defendants objected to the indictment on the grounds that the prosecution was barred by the free exercise clause of the first amendment. *Id.* at 81.

53. *Id.* at 82. Rejecting defendant's argument that the free exercise clause precludes the enforcement of the mail fraud statute, the Supreme Court agreed with the district court's charge that the defendants could be convicted if they did not "in good faith believe[] that the benefits which they represented would flow from their belief to those who embraced and followed their teachings, or . . . [if] representations were mere pretenses without honest belief on the part of the defendants . . ., made for the purpose of procuring money, and the mails were used for this purpose." *Id.* The Supreme Court concluded that the defendants could be convicted for mail fraud if they "did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money" so long as the inquiry focused not on the truth of the defendants' beliefs but rather on whether the defendants truly believed the representations that they were making. *Id.*

In *United States v. Rasheed*, the Ninth Circuit applied *Ballard* to uphold a conviction for mail fraud in which defendants were found to have made knowingly false representations about a church program. United States v. Rasheed, 663 F.2d 843, 847 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982). Declaring "that if one donated money to the Church, one would receive an 'increase of God' of four times that amount within a particular period of time," Rasheed represented that these funds would become available through church investments. *Id.* at 845-47. The Ninth Circuit held that the defendant's conduct, "based on knowingly false representations to induce others to donate money to the Church

God's Broker.[54] The court held, therefore, that the mail fraud prosecution against Gronowicz was constitutional and the subpoena "was issued pursuant to a proper grand jury investigation" satisfying the "*Schofield* rule".[55]

B. *Judge Garth's Concurring Opinion*

Judge Garth wrote separately to emphasize the narrow limits of the court's holding in *Gronowicz*.[56] According to Judge Garth, the existence of any first amendment evidentiary privilege depends upon the stage of the criminal proceeding at which the privilege is asserted.[57] The target of a grand jury investigation, Judge Garth claimed, has no first amendment evidentiary privilege before the grand jury returns an indictment.[58] Moreover, in Judge Garth's opinion, the fifth amendment privilege, which a target can claim at the grand jury investigatory stage, precludes an assertion of any other constitutional privilege.[59] Judge Garth reached this conclusion "[i]n light of the Supreme Court's pronounced reluctance to create new evidentiary privileges . . . and the

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through the 'Dare to be Rich' program," was not constitutionally protected from prosecution under the mail fraud statute. *Id.* at 847.

54. 764 F.2d at 989 (Garth, J., concurring). *But see id.* at 994 (Hunter, J., dissenting) (criticizing the majority's reliance on *Ballard*). For a discussion of Judge Hunter's dissent, see *infra* notes 71-87 and accompanying text.

55. 764 F.2d at 989 (Garth, J., concurring).

56. *Id.* According to Judge Garth, the precedential value of the present case is limited to challenges to subpoenas issued pursuant to a grand jury investigation. *Id.*

57. *Id.* Judge Garth viewed the majority's "constitutional holding [as] limited to answering the precise question: does any first amendment privilege protect the *target* (Gronowicz) *of a grand jury investigation* from producing documents sought by a subpoena *duces tecum*?" *Id.* (emphasis added). Judge Garth agreed with Judge Gibbons' distinction between the first amendment rights of the target of a grand jury investigation and the common law privilege accorded to a third party witness requested to reveal confidential sources. *Id.* at 990 n.2 (Garth, J., concurring). For a discussion of the majority's analysis of the journalists' privilege, see *supra* notes 29-32 and accompanying text.

58. 764 F.2d at 989 (Garth, J., concurring). It should be noted that Judge Garth did not make a distinction between an author and other targets of a grand jury investigation. *Id.* Rather, he simply noted, that "no first amendment privilege may be claimed by a target of a grand jury." *Id.* According to Judge Garth, the *Schofield* requirements, which ensure prosecutorial good faith, provide all the protection an author needs when called before a grand jury. *Id. But see id.* at 991 (Becker, J., concurring) ("I take issue . . . with Judge Garth's statement that '[t]he *Schofield* rule, when met . . . supplies all the initial first amendment protections needed before a grand jury,' if [this is meant] to suggest that First Amendment concerns cannot support a more stringent *Schofield* requirement in particular cases.") For a discussion of Judge Becker's concurring opinion, see *infra* notes 62-70 and accompanying text.

59. 764 F.2d at 990 (Garth, J., concurring). As previously noted, Gronowicz refused to claim a fifth amendment privilege to comply with the subpoena *duces tecum*. See *supra* note 28.

broad sweep of legitimate grand jury inquiries.[60] Once the grand jury

60. 764 F.2d at 990 (Garth, J., concurring) (citations omitted) (citing United States v. Calandra, 414 U.S. 338 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972)).

In *Branzburg*, the Supreme Court determined the extent of a journalist's privilege against compelled disclosure of confidential sources to a grand jury. 408 U.S. at 687. In a five to four decision, the Court concluded that to require newsmen to appear and testify before state or federal grand juries did not abridge the freedoms of speech and press guaranteed by the first amendment. *Id.* at 690. The Court did, however, state that grand jury investigations are not outside the perimeters of the first amendment. *Id.* at 707. Although the Court declined to develop a test for when a journalist could legally refuse to answer grand jury questions which delve into the sanctity of a journalist's sources, it did make the following observation:

> grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

Id. at 707-08. Absent a showing that the grand jury was acting in bad faith, the Court concluded that "the public interest in law enforcement and in ensuring effective grand jury proceedings" outweighs "the consequential, but uncertain . . . burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." *Id.* at 690-91.

Some have interpreted *Branzburg* as extending a limited privilege to journalists called to testify before grand jurys. *See, e.g.*, Saxbe v. Washington Post Co., 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) ("[A] fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated."); Goodal, Branzburg v. Hayes *and the Developing Qualified Privilege For Newsmen*, 26 HASTINGS L.J. 709, 716-19 (1975); Note, *Qualified Privilege for Journalists*—Branzburg v. Hayes: *A Decade Later*, 61 U. DET. J. URB. L. 463, 475-76 (1984).

In *Calandra*, the target of a grand jury investigation refused to answer questions concerning evidence obtained by and illegal search and seizure. United States v. Calandra, 414 U.S. 338, 341 (1974). The district court suppressed the evidence and ordered that Calandra "need not answer any of the grand jury's questions based on the suppressed evidence." *Id.* at 341-42. The Sixth Circuit affirmed, holding that a grand jury witness may invoke the exclusionary rule in order to avoid answering questions based on evidence obtained in an unlawful search and seizure. 465 F.2d 1218 (6th Cir. 1972). Noting that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," the Supreme Court reasoned that since extension of the exclusionary rule would "seriously impede the grand jury" without significantly deterring law enforcement agents, the rule is unnecessary in the grand jury setting. 414 U.S. at 348-51. The Supreme Court emphasized the historic distinction between a grand jury proceeding and a criminal trial, noting:

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence

has returned an indictment, however, Judge Garth believed that Gronowicz could make a first amendment challenge to the indictment, the mail fraud statute, or the prosecution of the indictment.[61] At the present stage of the criminal proceeding, however, Gronowicz could not raise any first amendment objections.[62]

C. *Judge Becker's Concurring Opinion*

Joining with Judge Gibbons, Judge Becker expressed his view on the breadth of a district court's discretionary supervisory power over the grand jury process, which he characterized as necessary "to preserve the grand jury's historic role as a bulwark between the individual and the state."[63] According to Judge Becker, this supervisory power permits a court to employ a "heightened" *Schofield* analysis where, as in *Gronowicz*, the grand jury investigation involves "core" first amendment interests.[64] Although declining to define the standards of this "heightened" *Schofield* test,[65] Judge Becker indicated that the government must provide "a solid foundation" for an inquiry which has the potential for chilling the

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> or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.

Id. at 343.

61. 764 F.2d at 989 (Garth, J., concurring).

62. *Id.* at 990 (Garth, J., concurring). Judge Garth refused to speculate on the constitutional merits of such a hypothetical indictment because the issue was not yet ripe. *Id.* at 989 (Garth, J., concurring).

63. *Id.* at 991 (Becker, J., concurring) (citing Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1115 (E.D. Pa. 1975)). In *Hawthorne*, then district Judge Becker noted:

> the *grand jury is an arm of the Court*. The district court has the power to call a grand jury into existence . . . [and] the power to issue and the duty to enforce grand jury subpoenas. It is settled . . . that the *district court has supervisory power over the grand jury* and that a broad range of devices is available to a district court in resolving challenges to the propriety of grand jury process, including consideration of affidavits.

406 F. Supp. 1098, 1103-04 n.4 (emphasis added).

64. 764 F.2d at 991 (Becker, J., concurring). Judge Becker read *Schofield* as "requir[ing] additional justification for a subpoena" when the court, in its discretion, feels additional information is necessary in order to assure proper use of the subpoena power. *Id.* Indeed, the court in *Schofield* noted: "where the district court is not satisfied with the affidavits presented by the government, whether because the matters set forth challenge the court's credibility or because the witness has made some colorable challenge to the affidavits, the court can require something more. *Schofield II*, 507 F.2d at 965.

65. 764 F.2d at 991 (Becker, J., concurring). Judge Becker did indicate, however, that when a subpoena *duces tecum* raises first amendment concerns, that the district court should apply a fact-sensitive analysis to determine whether it was properly issued. *Id.* Such a determination might necessitate formal hearings to resolve the question of whether a prosecutor acted in bad faith by seeking a subpoena *duces tecum* which infringes on first amendment rights. *Id.* at 992 (Becker, J., concurring). This is in accord with *Schofield*, in which the Third Circuit suggested that when a district court questions the validity of a *Schofield* affidavit, "[v]arious avenues of inquiry are open to a court . . . among them

exercise of first amendment rights.[66] While disagreeing with Judge Garth's assertion that the *Schofield* standard "supplies all the initial first amendment protections needed before a grand jury,"[67] Judge Becker nonetheless agreed that a grand jury target has no absolute first amendment privilege.[68] Thus, while Judge Becker found the government's *Schofield* affidavits insufficient under his stricter standard,[69] he joined the majority in enforcing the subpoena because Gronowicz failed to challenge the sufficiency of the *Schofield* affidavits, choosing instead to rely exclusively on his asserted absolute first amendment privilege.[70]

D. *Judge Hunter's Dissenting Opinion*

In dissent,[71] Judge Hunter agreed with the majority's finding that to

discovery, *in camera* inspection, additional affidavits and a hearing." *Schofield II*, 507 F.2d at 965.

66. 764 F.2d at 991 (Becker, J., concurring). By requiring the government to provide convincing support for its subpoena, district judges "exercise their responsibility to prevent grand jury abuse." *Id.*

67. *Id.* For a discussion of Judge Garth's opinion, see *supra* notes 56-62 and accompanying text. According to Judge Becker, a heightened *Schofield* analysis is consistent with *Branzburg v. Hayes* in which the Supreme Court stated "we do not expect that courts will forget that grand juries must operate within the limits of the First Amendment." 764 F.2d at 991 (Becker, J., concurring) (quoting Branzburg v. Hayes, 408 U.S. 665, 708 (1972)).

For a discussion of the majority opinion in *Branzburg*, see *supra* note 60 and accompanying text.

Justice Powell's concurrence in *Branzburg* was the vote necessary to swing the Court away from recognizing a first amendment privilege for journalists in grand jury proceedings. *See generally Branzburg*, 408 U.S. 665. He emphasized that the Court's holding did not deprive a journalist of all first amendment rights when appearing before a grand jury. *Id.* at 709 (Powell, J., concurring). Justice Powell's opinion indicated that the Court was actually extending a limited privilege to journalists, allowing them to refuse to testify before a grand jury when: (1) the grand jury investigation was not being conducted in good faith; (2) the information sought was only remotely or tenuously related to the investigation; or (3) "[the journalist's] testimony implicate[d] confidential source relationships without a legitimate need of law enforcement." *Id.* at 710 (Powell, J., concurring). For a discussion of the proposition that the *Branzburg* Court recognized a limited journalist privilege before a grand jury, see Goodal, *supra* note 60, at 716-19; Note, *supra* note 60, at 475-76.

68. 764 F.2d at 991 (Becker, J., concurring). In reaching this conclusion, Judge Becker stated, "[t]he discriminating exercise of supervisory power that I advocate is not tantamount to a First Amendment *privilege* for targets or subjects of grand jury investigations." *Id.* (emphasis supplied by the court).

69. *Id.* Judge Becker criticized the government's reliance on "an anonymous tip" which was incorporated into a sworn affidavit. *Id.* A more detailed affidavit, submitted by the government in support of the subpoena *duces tecum*, containing "an affidavit from Wladyslaw Cardinal Rubin, of the Vatican Secretariat, confirming the substance of the . . . *Schofield* affidavit" relied on by the district court, was not "read nor relied upon in ruling on the motion to quash the subpoena." *Id.* at 991 n.1 (Becker, J., concurring).

70. *Id.* at 990-91 (Becker, J., concurring).

71. *Id.* at 992 (Hunter, J., dissenting). Judge Sloviter joined in Judge Hunter's opinion. She also wrote separately in dissent. *Id.* at 1000 (Sloviter, J.,

be valid the grand jury subpoena must satisfy the *Schofield* requirements.[72] However, contrary to the majority, Judge Hunter concluded that the subpoena *duces tecum* directed to Gronowicz was invalid because it was not issued for a proper purpose.[73] Judge Hunter criticized the majority for failing to recognize the real focus of the grand jury investigation—the truth or falsity of *God's Broker*.[74] Noting that if the book were true the representations were not fraudulent, Judge Hunter asserted that the government was not investigating the truth of the representations made by Gronowicz but rather was investigating the truth of the book itself.[75]

According to Judge Hunter, *God's Broker*, even if false, is entitled to protection from government prosecution under the first amendment.[76] Relying in part on *Cantwell v. Connecticut*,[77] Judge Hunter stated that false speech, if it is not defamatory, is protected under the first amendment.[78] In *Cantwell*, the Supreme Court reversed the conviction of a Jehovah's witness for breach of peace stemming from the public playing of records critical of other religions on the ground that unpopular speech, offen-

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dissenting). For a discussion of Judge Sloviter's opinion, see *infra* notes 112-16 and accompanying text.

72. 764 F.2d at 992 (Hunter, J., dissenting). For a discussion of the *Schofield* test, see *supra* notes37-38 and accompanying text.

73. 764 F.2d at 992-93 (Hunter, J., dissenting).

74. *Id.* at 992 (Hunter, J., dissenting). Specifically, Judge Hunter criticized what he perceived as the majority's "unsupported assumption that the 'grand jury's investigation appears, so far as the record discloses, to be focused upon the truth or falsity of the representations made by Gronowicz to Richardson & Synder, the publisher, and Leonard, the motion picture producer.' " *Id.* (quoting *Gronowicz*, 764 F.2d at 987). According to Judge Hunter, the majority ignored the government's own admissions that the grand jury investigation focused on the contents of the book itself. *Id. But see id.* at 987 ("[s]ince, however, those representations, particularly about the extent of Gronowicz's personal contact with Pope John Paul II, are repeated in the book, the inquiry will of necessity examine the accuracy of its contents.") (footnote omitted). For a discussion of the majority's opinion, see *supra* notes 14-55 and accompanying text.

75. *Id.* at 992 (Hunter, J., dissenting). *Cf.* 764 F.2d at 994 (Higginbotham, J., dissenting). While finding the investigation directed at the contents of God's Broker, Judge Higginbotham did "not find that fact dispositive." *Id.* at 995. For a discussion of Judge Higginbotham's dissenting opinion, see *infra* notes 88-111 and accompanying text.

76. 764 F.2d at 992-93 (Hunter, J., dissenting). Judge Hunter cited *New York Times v. Sullivan* for the proposition that "the First Amendment protects citizens from government prosecution for false speech." 764 F.2d at 992 (Hunter, J., dissenting). Judge Hunter noted that the Court in *Sullivan* stated that " 'erroneous statement is inevitable in free debate, and. . . must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive." ' " *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964)). For a discussion of *Sullivan* see *supra* note 49 and accompanying text.

77. 310 U.S. 296, 310 (1940).

78. 764 F.2d at 993 (Hunter, J., dissenting).

sive to some, is protected by the first amendment absent a clear and present danger to a substantial state interest.[79] In order to justify "official action" which adversely impacts Gronowicz's first amendment rights, therefore, Judge Hunter would require that the government must establish a compelling governmental interest.[80] Reasoning that there was no independent compelling interest justifying the mail and wire fraud investigations,[81] Judge Hunter believed the court should not enforce the subpoena.[82]

Judge Hunter concluded his opinion with a criticism of the majority's reliance on *Herbert v. Lando* and *United States v. Ballard*.[83] In *Herbert*, the defendants in a civil defamation action brought by a public figure refused to answer discovery questions concerning their state of mind

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79. 310 U.S. 296, 310 (1940). In *Cantwell*, a Jehovah's witness was convicted of breach of peace for loudly voicing statements offensive to various religious groups. *Id.* The Supreme Court reversed Cantwell's conviction stating that:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310. Absent a clear and present danger to a substantial state interest, the Court concluded, an unpopular view is protected by the first amendment. *Id.*

80. 764 F.2d at 993 (Hunter, J., dissenting) (citing N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); Thomas v. Collins, 323 U.S. 516 (1945)). The cases cited by Judge Hunter involved asserted infringements of the freedom of association clause of the first amendment. *See, e.g., Button*, 371 U.S. at 437 (finding statute prohibiting N.A.A.C.P. from requiring litigants, in discrimination suits in which the N.A.A.C.P. helps defray costs, to utilize staff attorneys interferes with that organizations freedom of association); *Gibson*, 372 U.S. at 539 (legislative committee could not compel association president to produce association's membership records and utilize them to identify which suspected communists were members of the association); *Bates*, 361 U.S. at 523 ("compulsory disclosure of membership lists . . .[is] a significant interference with the freedom of association."); *Thomas*, 323 U.S. at 542 (statute requiring labor union organizer's to register with secretary of state and secure organizer's card before soliciting members violates first amendment freedom of association)).

81. *Id.* at 993 (Hunter, J., dissenting). The government asserted that it has a compelling interest in enforcing the mail and wire fraud statutes. *Id.* Judge Hunter found this an insufficient governmental interest since the alleged fraud "is inextricably meshed with the contents of the book." *Id.* In Judge Hunter's opinion, the compelling governmental interest must be separate and distinct from the prevention of fraud. *Id.*

82. *Id.*

83. *Id.* at 993-94. (Hunter, J., dissenting) (citing Herbert v. Lando, 441 U.S. 153 (1979); United States v. Ballard, 322 U.S. 78 (1944)).

For a discussion of the majority's reliance on *Herbert*, see *supra* notes 34-36 & 39 and accompanying text. For a discussion of the majority's reliance on *Ballard*, see *supra* notes 42-44 and accompanying text.

during the editorial process, asserting that the information was protected by the first amendment.[84] The Supreme Court rejected this defense and held that when the defendant's state of mind at the time of publication is an essential element of the plaintiff's claim of defamation, the plaintiff must be allowed to prove his case.[85] Judge Hunter distinguished *Herbert* from the present case on the grounds that the first amendment's primary purpose is to provide protection from governmental intrusion into free expression rather than limit the ability of a private citizen to vindicate his tarnished reputation.[86] Additionally, Judge Hunter found *Ballard*, which involved a challenge to the mail fraud statute premised on the free exercise clause of the first amendment, inapplicable to an attack based on the free speech clause of the first amendment.[87]

E. *Judge Higginbotham's Dissenting Opinion*

Despite its potential chilling effect on the publication of works dealing with political and religious issues, Judge Higginbotham regretfully agreed with the majority's conclusion that the government's legitimate interest in prosecuting mail fraud is not outweighed by the threat of such chill "under prevailing first amendment doctrine."[88] Judge Higginbotham dissented, however, on the "analytically distinct" ground that the process for gathering evidence upheld by the majority "will so inhibit the gathering and recording of facts and intrude upon editorial processes as to chill protected speech."[89]

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84. 441 U.S. at 157.

85. *Id.* at 170.

86. 764 F.2d at 994 (Hunter, J., dissenting). Judge Hunter noted that in *Herbert* the Court recognized the need for a civil litigant to inquire into the editorial process in order to prove the intent required by the first amendment in a civil defamation action. *Id.*

87. *Id.* (citing United States v. Ballard, 322 U.S. 78 (1944)). Judge Hunter distinguished Gronowicz's claim from that in Ballard emphasizing that the Court in *Ballard* "held . . . that the government may not inquire into the truth or validity of any particular religious belief relying exclusively on the Free Exercise Clause of the First Amendment." *Id.* According to Judge Hunter, because "the defendants in that case did not . . . mount a challenge to the prosecution based on the Free Speech Clause", *Ballard* is inapplicable to the present matter. *Id.*

88. *Id.* at 994 (Higginbotham, J., dissenting). Judge Higginbotham did note, however, his belief that "the first amendment theory espoused in the dissents of Judge Hunter and Judge Sloviter an attractive one, [which if] writing on a clean slate [he] would wholeheartedly endorse." *Id.* at 998 (Higginbotham, J., dissenting). Judge Higginbotham, absent contrary precedent, would find the chill of such investigation, which "contribute[s] incrementally to a climate that discourages the publication of books on controversial topics," to infringe on an author's first amendment right to such a degree as to outweigh the government's interest in prosecuting fraud. *Id.*

89. *Id.* at 994 (Higginbotham, J., dissenting). According to Judge Higginbotham, "[t]he question of whether the government may inquire into the truthfulness of statements of fact in a work of nonfiction—and prosecute the author for knowing or reckless falsehoods—is analytically distinct from the question of

Initially, Judge Higginbotham noted his approval of Judge Hunter's conclusion that the government's purpose was to investigate the contents of *God's Broker*, thereby implicating the first amendment privileges extended to the contents of published speech.[90] According to Judge Higginbotham, the question raised by the grand jury investigation against Gronowicz was to "what extent the first amendment protects citizens from a viewpoint-neutral prosecution for making false statements of fact in a nonfiction work dealing with important political and religious issues."[91] Relying on *Herbert*[92] and *Gertz v. Robert Welch, Inc.*,[93] Judge Higginbotham found Gronowicz's first amendment protection no greater than the protection given libelous statements since "there is no constitutional value in false statements of fact."[94] Thus since libelous

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how the government may proceed. *Id.* at 998 (Higginbotham, J., dissenting) (emphasis in original). For a discussion of the means of gathering evidence Judge Higginbotham would require, see *infra* notes 98-111 and accompanying text.

90. 764 F.2d at 994-95 (Higginbotham, J., dissenting). Indeed, Judge Higginbotham criticizes the majority's characterization of the purpose of the investigation stating, "we give the appellant's first amendment contentions grievously short shrift if our analysis pretends that this investigation does not implicate the contents of published speech but rather goes to, as the majority would have it, 'misrepresentations about the contents' of published speech." *Id.* at 995 (Higginbotham, J., dissenting). *But see id.* at 987 ("Since, however, those representations [to the publisher and movie producer], particularly about the extent of Gronowicz's personal contact with Pope John Paul II, are repeated in the book, the inquiry will of necessity examine the accuracy of its contents.") (footnote omitted).

In addition to declaring the true purpose of the grand jury investigation, Judge Higginbotham dispensed with a number of "red herrings" prior to his first amendment analysis. *Id.* at 994-95 (Higginbotham, J., dissenting). Judge Higginbotham rejected the government's contention that because the book was sold for profit this was a commercial speech case, finding, instead, that "a book addressing important social and political issues . . . is . . . in the main, 'core' first amendment speech." *Id.* at 995 (Higginbotham, J., dissenting). Finally, the dissenter rejected the argument of Gronowicz and the Amici that the prosecution was brought to punish viewpoints contrary to vatican officials. *Id.* at 995-96 (Higginbotham, J., dissenting). Because the record fails to disclose any information to substantiate the claim that the investigation is not viewpoint neutral, Judge Higginbotham concluded that "[a]t this stage . . . the government's representation that they are evenhandedly investigating possible false statements of fact (*contained in the book*) that may have induced certain entrepreneurs to part untimely with their venture capital" must be accepted. *Id.* (emphasis in original).

91. *Id.* at 996 (Higginbotham J., dissenting). For a discussion of the restrictions placed on a grand jury investigating possible criminal violations on the part of an author when the investigation requires inquiry into the truth or falsity of the author's work, see *infra* notes 149-72 and accompanying text.

92. 441 U.S. 153 (1979).

93. 418 U.S. 323 (1974).

94. 764 F.2d at 996 (Higginbotham, J., dissenting) (quoting *Gertz*, 418 U.S. at 340). Judge Higginbotham reasoned that Justice Powell, in *Gertz*, "summed up the prevailing view":

Under the First Amendment there is no such thing as a false idea.

statements made knowingly or recklessly are not protected speech,[95] false statements prosecuted under the mail fraud statute, which requires the falsehoods be made knowingly or recklessly, are not protected.[96] Judge Higginbotham saw no reason to distinguish criminal liability for fraud from libel for first amendment purposes since the relevant question is "not the form in which state power has been applied," but whether the speech is protected.[97] Therefore, Judge Higginbotham

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> However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *But there is no constitutional value in false statements of fact.* Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate on public issues. . . .
>
> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.

Id. (quoting *Gertz*, 481 U.S. at 339-41) (emphasis supplied by Judge Higginbotham).

For a discussion of the balance the Supreme Court has sought to achieve in libel cases between society's interest in freedom from defamation with the need to avoid self-censorship, see *supra* note 49.

95. *Id.* at 997 (Higginbotham, J., dissenting). Judge Higginbotham noted that "[o]nly libelous statements that are *nonculpable* are protected in all contexts. Statements libeling private figures receive no protection if negligently made, *even in the context of discussion of important public issues.*" *Id.* at 996-97 (Higginbotham, J., dissenting) (emphasis supplied by Judge Higginbotham) (comparing *Gertz*, 418 U.S. at 347) ("the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.") *with* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (plurality opinion) (extending first amendment protection to all "matters of public or general concern, without regard to whether the persons involved are famous or anonymous.")). Moreover, though "[l]ibelous statements regarding public officials and 'public figures' receive the *highest* degree of first amendment protection, . . . even they can be actionable if made with 'malice'—i.e., knowingly or recklessly." *Id.* (citing New York Times v. Sullivan, 376 U.S. at 265-66).

96. *Id.* at 997 (Higginbotham, J., dissenting). Judge Higginbotham found no reason to distinguish libel from fraud for first amendment purposes since both are " 'speech' containing false statements of fact that cause palpable harm." *Id.* As long as the mail fraud statute requires proof that the fraudulent representations were made knowingly or recklessly, Judge Higginbotham believed that a prosecution for mail fraud is not prohibited by the first amendment. *Id.*

97. *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 265 (1964)). Gronowicz argued that he should not be subject to criminal liability for fraud even if he may be subject to civil liability. *Id.* While agreeing with Gronowicz that the threat of criminal sanctions is more likely to result in self-censorship on the part of journalists than the threat of civil action and thus deter the dissemination of truthful speech, Judge Higginbotham nonetheless recognized that under present precedent, no greater first amendment protection attaches to a journalist's work in a criminal prosecution than in a civil action. *Id.*

Further, Judge Higginbotham noted that in *Garrison*, "a criminal libel case,

concluded, the first amendment does not bar the grand jury's inquiry into a potential mail fraud violation.[98]

While finding the subject matter of the grand jury investigation was proper, Judge Higginbotham concluded that the government's procedure for obtaining information was violative of the journalist's evidentiary privilege.[99] Judge Higginbotham found that the journalists'

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the [Supreme] Court continued to hold that the 'knowingly false statements made with reckless disregard of the truth, do not enjoy constitutional protection.'" *Id.* (citing *Garrison*, 379 U.S. at 75).

In *Garrison*, the District Attorney for the Parish of New Orleans was convicted under the Louisiana criminal defamation statute. *Garrison v. Louisiana*, 379 U.S. at 65. This statute makes it a crime to utter defamatory statements if such statements are true but made with "actual malice," ill will, or no reasonable belief in their truth. *Id.* at 78. The action arose out of allegations made by Garrison to the effect that the backlog of criminal cases was due to "inefficiency, laziness, and excessive vacations of the judges." *Id.* at 66. He further accused the judges of supporting vice within the city. *Id.* The Supreme Court held that "the *New York Times* rule . . . limits state power to impose criminal sanctions for criticism of the official conduct of public officials" in the same manner it restricts the imposition of civil judgments in defamation cases. *Id.* at 67-70. In support of its holding the court quoted the American Law Institute which says:

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither or these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country. . . .

Id. at 69-70 (quoting MODEL PENAL CODE, § 250.7, comments at 44 (Tent. Draft No. 13, 1961)).

98. 764 F.2d at 998 (Higginbotham, J., dissenting).

99. *Id.* Judge Higginbotham noted that for the past fifteen years, the Third Circuit has wrestled with the conflicting interests which arise from "attempts by government investigators to compel the press to turn over unpublished information in its possession." *Id.* Under the authority of Rule 501 of the Federal Rules of Evidence, Judge Higginbotham noted, that the Third Circuit has recognized an evidentiary privilege for journalists which "attempt[s] to accommodate the competing interests" of law enforcement agents and the journalistic profession. *Id.* (citing United States v. Criden, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979)).

In *Riley*, a Chester police officer, a mayoral candidate in 1979, instituted a civil action against the city's chief of police and the city's mayor who was running for reelection. 612 F.2d 708, 710 (3d Cir. 1979). The suit, filed pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983, alleged that the defendants violated plaintiff's constitutional right to freely run for public office. *Id.* Plaintiff alleged that defendants investigated his job performance and subsequently made these reports public through a reporter. *Id.* The plaintiff called the reporter as a witness, seeking to prove that the defendants were the source of the story. *Id.* The reporter, however, refused to identify her source. *Id.* Recognizing a need to strike a balance between the government's interest in prosecution of crime and the news media's interest in preventing compelled disclosure of source material

privilege from compelled disclosure of his source materials that the Third Circuit recognized in *United States v. Cuthbertson (Cuthbertson I)*,[100] was broad enough to protect the author of a book.[101]

In *Cuthbertson I*, the defendants, who were indicted for conspiracy and fraud, directed a subpoena *duces tecum* to be served against C.B.S. Inc. which sought, inter alia, all notes, documents, and video tapes pertaining to the production of a 60 Minutes program.[102] The Third Circuit upheld the refusal of C.B.S. to comply with the subpoena, even though the district court narrowed its coverage and only permitted *in camera* inspection,[103] holding "that journalists possess a qualified privi-

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in order to insure free dissemination of information, the Third Circuit held that a journalist must reveal his sources when testifying in a civil case after it is shown that the party seeking the information has exhausted all other possible means of gathering that information and that the information is highly relevant to the case. *Id.* at 717. The *Riley* court recognized that the extent of a journalist's privilege could only be resolved on an "ad hoc basis." *Id.* at 715.

The journalists' privilege is likewise limited in criminal cases. *See, e.g.*, United States v. Criden, 633 F.2d 346, 357-58 (3d Cir. 1980) (journalists have a limited privilege in criminal cases which may yield to a defendant's fifth and sixth amendment rights), *cert. denied*, 449 U.S. 1113 (1981); United States v. Cuthbertson (*Cuthbertson I*) 630 F.2d 139, 147 (3d Cir. 1980) ("journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases."), *cert. denied*, 449 U.S. 1126 (1981)).

For a discussion of *Cuthbertson*, see *infra* notes 101-04 and accompanying text. For a discussion of *Criden*, see *infra* notes 108-09 and accompanying text.

100. 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

101. 764 F.2d at 998 (Higginbotham, J., dissenting). For a discussion of *Cuthbertson*, see *infra* notes 102-04 and accompanying text.

102. *Cuthbertson I*, 630 F.2d at 142. C.B.S. broadcast, during its news program 60 Minutes, a program entitled "From Burgers to Bankruptcy", in which it reported on the activities of Wild Bill's Family Restaurants (Wild Bill's) and concluded with a statement by Mike Wallace that the F.B.I. and the United States Attorney were investigating Wild Bill's and expected to present evidence to a grand jury in the near future. *Id.* Nine months later, defendants were indicted by a grand jury in Newark. *Id.* Shortly before commencement of the trial, defendants served C.B.S. with a subpoena duces tecum requesting:

> [I]nvestigator's notes regarding interviews with franchisees and employees of Wild Bill's, filmed interviews of such individuals which were not aired, which are called "out-takes" and notes pertaining to franchises and employees who refused to be interviewed by your investigators, and, also all video tapes, audio tapes, notes, memoranda, reports and documents of any nature pertaining to the preparation of the program aired in December, 1978 entitled "From Burgers to Bankruptcy."

Id.

103. C.B.S. objected to the subpoena on the grounds that newsmen possessed a first amendment privilege protecting them from compelled disclosure of source material. *Id.* The district court modified the subpoena to include only "verbatim or substantially verbatim statements relating or referring to Wild Bill's" made by approximately one hundred persons the government intended to call as witnesses and ordered these documents be produced to the court for *in camera* inspection. C.B.S. refused to comply with the order and was held in civil contempt. *Id.* at 143.

lege not to divulge confidential sources and *not to disclose unpublished information in their possession in criminal cases*."[104]

The *Cuthbertson* court reasoned that a journalists' privilege served the necessary purposes of "protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure."[105] In *Gronowicz*, Judge

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104. *Id.* at 147 (emphasis added). In *Cuthbertson I*, The Third Circuit initially noted that the *Riley* court held that "journalists have a federal common-law qualified privilege arising under FED. R. EVID. 501 to refuse to divulge their confidential sources." *Id.* at 146. Recognizing that *Riley* involved a civil action, the *Cuthbertson* court nonetheless found the principles surrounding the granting of a qualified journalist privilege—"the unfettered communication to the public of information and opinion, a policy . . . grounded in the first amendment"—to be equally applicable in criminal proceedings. *Id.* The court rejected the contention that a criminal defendant's sixth amendment right to a fair trial outweighs the newsman's first amendment right to freedom of speech. *Id.* The court noted that the Supreme Court, in *Nebraska Press Association v. Stuart*, refused to prioritize the Bill of Rights when it stated:

> The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . [I]f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

Id. at 147 (quoting Nebraska Press Association v. Stuart, 427 U.S. 539, 561 (1976)).

Thus, the Third Circuit reasoned that a district court, when deciding whether to uphold a subpoena *duces tecum* "must balance the defendant's need for the material against the interests underlying the privilege. . . ." *Id.* at 148. While declining to specifically list factors to be utilized by the decision maker, the Third Circuit did state that the defendant's need for the information and the confidentiality of the sources were among the factors to be considered. *Id.* at 147-48. On remand the district court, after an *in camera* inspection of C.B.S.'s witness statements, ordered the statements turned over to the defendants as exculpatory evidence and further ordered that "non-witness material to enhance intelligibility of the witness statements" be handed over as well. United States v. Cuthbertson (*Cuthbertson II*), 651 F.2d 189, 192 (3d Cir. 1981). On appeal, the Third Circuit, drawing from its "*Riley-Cuthbertson-Criden* trilogy" held that the criterion set forth in *Criden* "must be met before a reporter may be compelled to disclose confidential information." *Id.* at 195 (citing United States v. Criden, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)). This three prong test requires:

> First, the movant must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her sources. Finally, the movant must persuade the Court that the information sought is crucial to the claim.

Id. at 195-96 (citing *Criden*, 633 F.2d at 358-59). Concluding that the district court failed to apply this three prong test to the facts of the case, the *Cuthbertson* court re-remanded the case to the district court. *Id.* at 196.

For a discussion of *Criden*, see *infra* notes 108-09 and accompanying text.

105. 764 F.2d at 998 (Higginbotham, J., dissenting) (quoting *Cuthbertson I*, 630 F.2d at 147). Judge Higginbotham also indicated that the grand jury investigation might result in exposure of confidential sources. *Id.* Protection of confi-

Higginbotham found these concerns implicated by the grand jury subpoena.[106] While acknowledging that, in the past, the Third Circuit had never granted the journalist's privilege to an author of a book who is the target of a grand jury investigation, Judge Higginbotham concluded that no legitimate reason warranted against its application.[107]

Despite its applicability to *Gronowicz*, Judge Higginbotham observed that the journalist's privilege must be weighed against the countervailing societal interests in the administration of justice.[108] These societal interests are accommodated under a standard developed in *United States v. Criden*[109] which requires that the journalist's privilege yield when the following three criteria are met:

> First, the movant must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her sources. Finally, the movant must persuade the court that the information sought is crucial

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dential sources is another concern which led to the development of a journalists' privilege. *Id.* Further, Judge Higginbotham noted that "[t]he 'hassle' and exposure that complying with subpoenas such as this one . . . [involving a sweeping governmental request for Gronowicz's notes and records] . . . may lead journalists to suppress writings that could pique a prosecutor's curiosity." *Id.* (citing *Blasi*, *supra* note 27, at 265. Comment, *supra* note 27, at 1207-08, *infra* at nn.131, 153).

106. *Id.* at 999 (Higginbotham, J., dissenting). Judge Higginbotham found that application of the privilege to *in camera* inspection in *Cuthbertson* meant that "*[a] fortiori*, it should apply to grand jury subpoenas." *Id.* Judge Higginbotham noted that the court in *Cuthbertson* "recognized that even compelled production of unpublished information for *in camera* inspection by the court may inhibit the gathering and dissemination of information and . . . applied the privilege." *Id.* As the evidentiary privilege is necessary when the prosecutor seeks to present evidence to the court for inspection, it is likewise necessary when a prosecutor seeks to present evidence to a grand jury. *Id.* Additionally, he found no logical distinction based on the medium or by the fact that the journalist was the target of the investigation. *Id.* Judge Higginbotham noted that the privilege had been extended to various mediums of communication including a "newspaper article (as in *Criden*) [and] a television news magazine (as in *Cuthbertson*)." *Id.* Judge Higginbotham indicated that the competing interests of a grand jury investigation were accommodated by the standard developed in *United States v. Criden. Id.* Judge Higginbotham noted that it might be easier for the prosecutors to meet the requirements of the *Riley-Cuthbertson-Criden* trilogy when the writer is the target of a grand jury investigation thus more readily extinguishing the privilege. *Id.* For a discussion of *Criden*, see *infra* notes 109-110 and accompanying text.

107. 764 F.2d at 999. Judge Higginbotham reasoned that the rationale behind granting the privilege in other contexts was "broad enough to cover this case." For a discussion of the rationale behind the journalist privilege and its application to this case, see *supra* notes 98-105 and accompanying text.

108. *Id.*

109. *Criden*, 633 F.2d at 356. It was alleged that the Department of Justice and the United States Attorney's office of the Eastern District of Pennsylvania intentionally released information to the news media in order to harm the defendant's rights. *Id.* at 348.

to the claim.[110]

Judge Higginbotham found that the government's subpoenas and accompanying affidavits failed to satisfy any of the three *Criden* requirements.[111] Thus, he concluded that while the mail fraud investigation was proper, the investigative procedure violated Gronowicz's qualified journalist privilege.[112]

F. *Judge Sloviter's Dissenting Opinion*

While joining Judge Hunter in dissent and concurring with part two of Judge Higginbotham's dissent,[113] Judge Sloviter issued a separate dissent "to express [her] profound concern about the First Amendment values that the court has undermined by its decision."[114] According to Judge Sloviter,

> [t]he holding of this court opens the way for use of the uniquely powerful weapon of a grand jury investigation to inhibit publication of books because of their content not only by an unscrupulous prosecutor but, what is more dangerous, by one who is imbued with a sense of zealous righteousness.[115]

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110. *Id.* at 358-59 (citing *Riley*, 612 F.2d at 717). Although the court was faced with only the narrow issue of whether a journalist's privilege protected her from being compelled to affirm or deny the testimony of a self-avowed source, it acknowledged that the *Riley* test for determining whether a journalist must reveal its sources is applicable to criminal cases as well. *Id.* at 358. Since, in the case at bar the identity of the source was not in question, the court in applying the *Riley* test concluded that the test for requiring a journalist to verify a self-confessed source was less stringent than the test for requiring a journalist to reveal a source. *Id.* The court concluded that since the defendant had met the more stringent test by showing the testimony sought was relevant, not obtainable through due diligence, and needed in order to prepare for trial, it was unnecessary for the court to formulate any other test. *Id.* at 385-95.

111. 764 F.2d at 999 (Higginbotham, J., dissenting). According to Judge Higginbotham, the broad sweep of the government's request, which "must encompass nearly every piece of paper [Gronowicz] accumulated in preparing *God's Broker* . . . bespeaks a fishing expedition, not an attempt to obtain 'crucial' information." *Id.* at 999-1000 (Higginbotham, J., dissenting). Further, the government made no showing that it attempted to get the information from any other source. *Id.*

112. *Id.* Judge Higginbotham noted, however, that his conclusion would not prevent "the government from continuing this investigation or, indeed, from seeking enforcement of a modified subpoena." *Id.* at 1000 (Higginbotham, J., dissenting).

113. *Id.* at 1000 (Sloviter, J. dissenting). Judge Sloviter agreed with Judge Higginbotham's conclusions that "the government's *Schofield* submissions were inadequate to overcome Gronowicz' journalists' privilege" but not with Judge Higginbotham's conclusions that such investigations were permissible under the first amendment. *Id.* For a discussion of Judge Higginbotham's dissenting opinion, see *supra* notes 88-111 and accompanying text. For a discussion of Judge Hunter's dissenting opinion, see *supra* notes 11-87 and accompanying text.

114. *Id.*

115. *Id.* Judge Sloviter hypothesized that the following works could have

Asserting that "[t]his case is not governed by any of the authorities relied on by the majority," Judge Sloviter looks to the language of the Supreme Court in *Garrison* to find a distinction between civil and criminal actions directed against false speech.[116] In light of this language, absent any direct precedent to the contrary, Judge Sloviter "would hold that a criminal prosecution focusing on the truth of the contents [of a book is] . . . incompatible with the First Amendment."[117]

III. ANALYSIS AND EFFECT OF THE *GRONOWICZ* DECISION

A critical analysis of the *Gronowicz* decision points out the complexity and importance of the questions presented to the Third Circuit. Not only was the court split on the decision, but the members of the Third Circuit were unable to agree on the issues raised by the case.[118] It is

been targeted for grand jury investigation had the precedent established by the majority in *Gronowicz* been adopted earlier: " 'Rachel Carson's *Silent Spring*; Seymour Hersh's *Kissinger*; Ralph Nader's *Unsafe at Any Speed*; William Shawcross's *Sideshow: Kissinger, Nixon and the Destruction of Cambodia*; [and Walter & Miriam] Schneir's book on the Rosenberg case, *Invitation to an Inquest*' . . . Charles Darwin's *Origin of the Species* and the works of Galileo . . . ." as well as Woodward and Bernstein's work on Watergate. *Id.* at 1000-02 (Sloviter, J., dissenting) (quoting Brief for the Appellant at 7-8).

116. *Id.* 1000-01 (Sloviter, J., dissenting). Judge Sloviter points to Justice Brennan's *strong suggestion* "that criminal libel must be limited to speech that has a clear and present danger of leading to public disorder." *Id.* at 1001 (citing *Garrison*, 379 U.S. at 69). *But see id.* at 988 n.4 (*Garrison* itself rejected the contention "that there should be a first amendment distinction between criminal fraud and libel prosecutions on the one hand and civil fraud and libel on the other.") For a discussion of the proposition that *Garrison* does not limit criminal prosecutions for false speech, see *supra* notes 95-96 and accompanying text.

117. *Id.* at 1002 (Sloviter, J., dissenting).

118. According to Judge Gibbons, the author of the majority opinion, the question raised by Gronowicz's appeal was whether "the first amendment prohibits a prosecution for fraud whenever the prosecutor must inquire into the truth or falsity of the contents of a book." 764 F.2d at 986-87 (footnote omitted). Judge Garth interpreted the issue as being limited to the question: "does any first amendment privilege protect the target (Gronowicz) of a grand jury investigation from producing documents sought by a *subpoena duces tecum*?" *Id.* at 989 (Garth J., concurring) (emphasis in original). While agreeing with Judge Gibbon's formulation of the issue, Judge Becker wrote separately to advocate a "heightened" *Schofield* requirement where core first amendment concerns are implicated. *Id.* at 991 (Becker, J., concurring). For a discussion of the *Schofield* requirements, see *supra* note 38 and accompanying text.

In a dissenting opinion, Judge Hunter stated the issue as "whether the government issued the subpoena with a 'proper purpose' when its aim was to determine whether Gronowicz's book is true or false." *Id.* at 992 (Hunter, J., dissenting). Also dissenting, Judge Higginbotham saw the issue as two-fold. *Id.* at 994 (Higginbotham, J., dissenting). According to Judge Higginbotham, the first question was "to what extent the first amendment protects citizens from a viewpoint-neutral prosecution for making false statements of fact in a nonfiction work dealing with important political and religious issues." *Id.* at 996 (Higginbotham, J., dissenting). The second question presented, distinct from the first, was "*how* the government may proceed" to effectuate such a prosecution. *Id.* at 998 (Higginbotham, J., dissenting) (emphasis in original). Finally, Judge

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respectfully submitted that the *Gronowicz* case presented two distinct issues: (1) whether the first amendment prohibits a grand jury investigation into possible criminal violations by an author whenever such an investigation inquires into the truth or falsity of the author's work;[119] and (2) whether the first amendment limits the manner in which a grand jury investigation may inquire into the truth or falsity of a book.[120] It is further submitted that while the majority correctly answered the first question in the negative,[121] it failed to establish proper constitutional limitations for the manner in which an investigation into the truth or falsity of a book must proceed.[122]

A. *Constitutionality of a Grand Jury Investigation into the Truth or Falsity of the Contents of a Book*

Absent a body of case law addressing the question of whether the government can prosecute an author under the Federal Mail Fraud statute for misrepresenting the contents of a book,[123] the Third Circuit re-

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Sloviter identified the issue as whether a "criminal prosecution focusing on the truth of the contents [of a book] would be incompatible with the first amendment." *Id.* at 1002 (Sloviter, J., dissenting).

119. *Compare id.* at 986-97 (first amendment does not prohibit prosecution for fraud when a grand jury inquires into truth or falsity of book) *and id.* at 990-91 (Becker, J., concurring) (agreeing that first amendment does not prohibit prosecution of author for fraud) *and id.* at 994-98 (Higginbotham, J., dissenting) (first amendment does not prohibit view-point neutral investigation even if contents of author's work must be examined, *with id.* at 1000-02 (Sloviter, J., dissenting) (first amendment prohibits inquiry into truth or falsity of author's work).

120. *Compare id.* at 986 (the *Schofield* rule and not the first amendment governs the manner in which the government may proceed in conducting a grand jury investigation into possible criminal violations on the part of an author) *with id.* at 989 (Garth, J., concurring) (first amendment has no effect on how a government investigation may proceed on the grand jury level); *and id.* at 990-92 (Becker, J., concurring) (more than a mere *Schofield* showing is necessary to uphold a subpoena which seeks inquiry into an author's work) *and id.* at 998-1000 (Higginbotham, J., dissenting) (journalists' privilege applies to situations where author himself is target of grand jury investigation and thus, author's first amendment freedom must be balanced against societies' interest in investigating crime).

121. For a discussion of the constitutionality of a grand jury investigation inquiring into the truth of an author's work in order to investigate possible criminal activity on the part of the author, see *infra* notes 122-48 and accompanying text.

122. For a discussion of the first amendment limitations on the manner in which a grand jury investigation can inquire into the truth or falsity of an author's work, see *infra* notes 149-72 and accompanying text.

123. 764 F.2d at 987. Gronowicz himself conceded that "no reported case stands for the proposition that an author may not be prosecuted for misrepresenting the contents of a book." *Id.*

While the mail fraud statute has been liberally applied by prosecutors to cover numerous crimes which, absent the mail fraud statute, the government could not prosecute, no previous prosecution attempted to apply the statute to an author alleged to have misrepresented the contents of his work. *See generally* Hurson, *supra* note 3 (tracing application of mail fraud to numerous acts of

lied upon case law interpreting the first amendment protections of free speech.[124] Gronowicz asserted that because the grand jury investigation restricts free speech, "only a compelling governmental interest can justify any limitation on such expression, and the means chosen for protection of that interest may be no more intrusive than is necessary."[125] This standard, however, is restricted to prior restraints on speech.[126] Indeed, in all of the cases applying the compelling interest and the narrowly-drawn-means standards, the restriction on speech was imposed before dissemination of the publication.[127] The grand jury investigation of Gronowicz, however, was post publication.[128] It is submitted, there-

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fraud); Rakoff, *supra* note 3 (listing various situations to which the mail fraud statute has been applied); Note, *supra* note 3.

124. 764 F.2d at 987-88. For a discussion of the majority opinion, see *supra* notes 27-55 and accompanying text.

125. 764 F.2d at 987. Agreeing with Gronowicz that a prosecution which limits speech must be justified by a "compelling governmental interest," Judge Hunter relied upon the law of prior restraints, concluding that "false speech, not alleged to be defamatory, receives protection under the First Amendment." *Id.* at 993 (Hunter, J., dissenting). Judge Hunter seemed to imply that all false speech receives the same measure of first amendment protection and is thereby immune from punishment except under narrow circumstance. *See id. But see* New York Times v. United States, 403 U.S. 713, 730-40 (White, J., concurring in the per curiam opinion) (noting that the first amendment protection extended to the pre-publication period does not extend to the post-publication period). For a discussion of *New York Times*, see *supra* note 45 and accompanying text.

126. 764 F.2d at 987. For a discussion of first amendment standards applied to cases involving prior restraints, see *supra* note 45 and accompanying text.

127. *See, e.g.*, Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (striking down law which prohibited posting of "for sale" or "sold" signs in front of homes); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (city Human Relations ordinance prohibiting newspapers from publishing want-ads by sex-preference is a significant interest and therefore a constitutionally permissible restraint on free speech); N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (vague statutes curtailing freedoms protected by the first amendment are susceptible to sweeping rather than narrow interpretation and therefore unconstitutional); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon a showing of a subordinating interest which is compelling."); Thomas v. Collins, 323 U.S. 516 (1945) (laws restricting free speech must be justified in light of a clear public interest and must bear a substantial relationship to the evil they are designed to curtail); New Jersey State Lottery Comm'n v. United States, 491 F.2d 219 (3d Cir. 1974) (*en banc*) (prior restraint incidental to the achievement of valid government purpose permissible under first amendment), *vacated and remanded for a determination of mootness*, 420 U.S. 371 (1975); Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, 459 F.2d 676 (3d Cir.) (first amendment does not necessarily prohibit prior restraints which serve a valid government purpose), *cert. denied*, 409 U.S. 933 (1972).

128. 764 F.2d at 987. It should be noted that the government at no point in time has prevented Gronowicz from disseminating the ideas espoused in his work, but rather the publisher, by removing the work from circulation, has prevented the further spreading of Gronowicz's views. For a discussion of the law governing prior restraints, see *supra* note 45 and accompanying text.

fore, that the majority was correct in rejecting the prior restraint standard and instead focusing on the first amendment limitations created by post publication sanctions.[129]

Relying on the law of civil and criminal libel,[130] the majority concluded that, post publication, the government can prosecute an author for misrepresentation in the contents of a book.[131] In the post-publication context, first amendment rights are threatened by the chilling effect that a prosecution against an author may have on free speech;[132] nonetheless, first amendment rights offer no protection where fraudulent representations are made recklessly or intentionally.[133] Finding that the mail and wire fraud statutes require scienter equal to at least "the constitutional minimum for libel," the majority upheld the grand jury investigation of Gronowicz.[134] As Judge Higginbotham noted, however, the threat to free speech created by the potentiality of criminal defamation

129. *Id.* at 987. The mail fraud statute does not impose prior restraints on the dissemination of information. *Id.* at 987. Rather, the statute imposes post-publication sanctions for dissemination of any information sent via the United States mail in order to further a scheme to defraud. *See, e.g.*, 18 U.S.C. § 1341 (1984) (mail fraud statute does not prohibit the sending of information but rather imposes sanctions only after the communication is sent in furtherance of a scheme to defraud). As the Gronowicz court acknowledged, "we are dealing with the supposed chilling effect that the mail fraud statute would have upon authors if, after publication, they could be called to account for a conscious falsehood about the contents of a book." 764 F.2d at 987. For a full text of the mail fraud statute, see *supra* note 1.

130. For a discussion of the law of criminal and civil defamation, see *supra* notes 92-96 and accompanying text.

131. 764 F.2d at 988.

132. *See, e.g.*, 764 F.2d at 992 (Hunter, J., dissenting) (quoting New York Times v. Sullivan, 376 U.S. 254 (1964)) (" 'erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive." ' "); *id.* at 998 (Higginbotham, J., dissenting) (citing Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 265 (1971); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198, 1207-08 (1970)) ("The 'hassle' and exposure that complying with subpoenas such as this one may entail, it has been observed, may lead journalists to suppress writings that could pique a prosecutor's curiosity.").

133. *See* 764 F.2d at 988; *id.* at 997 (Higginbotham, J., dissenting). For a discussion of the majority's analysis of the scienter requirements of civil and criminal defamation, see *supra* notes 48-50 and accompanying text. For a discussion of Judge Higginbotham's analysis of the scienter requirements of civil and criminal defamation, see *supra* note 94 and accompanying text.

134. *Id.* at 988; *see also id.* at 997 (Higginbotham, J., dissenting) ("It does indeed appear that under the fraud statutes the government must prove that the falsehoods were knowingly or recklessly made."). For a discussion of the majority's conclusion that an author can be constitutionally prosecuted both criminally and civilly for fraudulently misrepresenting the contents of a book, see *supra* notes 41-50 and accompanying text. For a discussion of Judge Higginbotham's conclusion that an author can be constitutionally prosecuted for misrepresenting the contents of a book, see *supra* notes 91-97 and accompanying text.

actions may be greater than the threat imposed by civil defamations.[135] According to Judge Sloviter, it is "the role played by the government and its ability to control, and even manipulate, the grand jury," which distinguishes civil and criminal actions necessitating inquiry into an author's work.[136] Due to the potential for chill which arises out of such governmental investigations, Judge Sloviter would ban the latter type of prosecution except where such speech has "a clear and present danger of leading to public disorder".[137] Judge Sloviter supports this contention by interpreting the Supreme Court's dicta in *Garrison* as suggesting a reluctance to uphold criminal defamation statutes.[138] However, *Garrison* did not prohibit criminal libel but rather, while extending "the New York Times rule [to] also limit the state power to impose criminal sanctions for criticism of official conduct of public officials," expressed a belief that civil actions rather than criminal actions may be better suited to remedy defamatory speech.[139] It is submitted that the holding in *Garri-*

135. *Id.* at 997 (Higginbotham, J., dissenting). Judge Higginbotham noted, however, that the Court in *Sullivan* suggested that civil actions impose a greater threat of self-censorship than do criminal actions. *Id.* at 997 n.4 (quoting New York Times v. Sullivan, 376 U.S. at 277-78). The Court in *Sullivan* stated that:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusations falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. . . . Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.

Sullivan, 376 U.S. at 277-78. Judge Higginbotham further noted "that the record indicates that publication of appellant's biography of Greta Garbo has been delayed many years by the threat of a lawsuit by Miss Garbo," thus demonstrating the chilling effect that civil suits can place on publication of appellant's and other's works. 764 F.2d at 997 n.4.

136. 764 F.2d at 1001 (Sloviter, J., dissenting).

137. *Id.* Therefore, according to Judge Sloviter, since a book about the life of John Paul II, even if false, is not likely to "cause breaches of Peace," it is not the type of false speech properly subject to criminal action. *Id.*

138. *Id.* at 1001 (Sloviter, J., dissenting) (citing Garrison v. Louisiana, 379 U.S. 64 (1964)).

139. Garrison v. Louisiana, 379 U.S. 64, 67, 69-70 (1964). In stating it's preference for civil actions over criminal defamation actions, the Supreme Court noted "penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit." *Id.*

son straightforwardly applies the *Sullivan* standard to test the constitutionality of criminal libel statutes.[140] Unlike the criminal defamation statutes, such as the statute involved in the *Garrison* case, which are tailored to remedy the same wrong as civil defamation actions (slanderous utterances against an individual's character), the Mail Fraud statute seeks to remedy a different wrong than a civil suit alleging fraud.[141] It is submitted that the mail fraud statute is designed to punish those who misuse governmental property—the postal system—to achieve an illegal objective rather than to vindicate injury—fraud—sustained by a private individual.

Government prosecutors, if left unchecked, could foreseeably use the threat of subpoenaing journalists to determine whether they have misrepresented the truth of their work in an attempt to pressure journalists to forego publication of controversial works.[142] Nonetheless, absent case law holding that the first amendment places greater restrictions on government prosecutions for false speech than on a civil litigant's actions for false speech, such prosecutions fall within the limits of the first amendment as long as the government proves the requisite scienter.[143] While there may be merit to the contention that the mail fraud statute could be abused by an "unscrupulous prosecutor . . . who is imbued with a sense of zealous righteousness" using "the uniquely powerful weapon of a grand jury investigation to inhibit publication of books because of their content,"[144] the threat of such chill does not require the prohibi-

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at 69-70 (quoting MODEL PENAL CODE § 250.7 comments, at 44 (Tent. Draft No. 13, 1961)). Although the Supreme Court in *Garrison* does note that criminal actions for defamation are declining and statutes authorizing such prosecution are frequently omitted from such codes, it does not declare criminal actions for false speech unconstitutional absent a threat to the peace and at most suggests that the legislature could limit the application of criminal libel to false speech that threatens the peace. *See Garrison*, 379 U.S. at 69-70.

140. *Accord* 764 F.2d at 988 n.4 (rejecting Judge Sloviter's contention that there "should be a first amendment distinction between criminal fraud and libel prosecutions on the one hand and civil fraud and libel actions on the other.").

141. *See* 18 U.S.C. § 1341 (1982). For a full text of the mail fraud statute, see *supra* note 1 and accompanying text.

142. *See, e.g.*, 764 F.2d at 1001-02 (Sloviter, J., dissenting) (setting forth hypothetical situations in which the mail fraud statute could be used to suppress views contrary to those of the government). For a list of works that Judge Sloviter suggests could have been suppressed had the government sought to investigate the author for mail fraud, see *supra* note 114 and accompanying text.

While the mail fraud statute could potentially chill free expression, it is submitted that the proper way to minimize this inhibiting effect on free speech is to institute safeguards, such as a limited journalist privilege, to protect an author's first amendment rights rather than granting authors complete immunity from responsibility for fraudulent acts. For a discussion of the proposition that a limited journalist privilege should be extended to authors who are the targets of a grand jury investigation, see *infra* note 145 and accompanying text.

143. *See Gronowicz*, 764 F.2d at 988.

144. *Id.* at 1000 (Sloviter, J., dissenting). As an example, Judge Sloviter suggested that Woodward and Bernstein's investigation of Watergate could

tion of criminal prosecutions because of the first amendment.[145] It is submitted that the protection against prosecutorial abuse is constitutionally achieved by recognizing a limited journalists' privilege; the privilege would apply when prosecutors seek an author's work product to further a grand jury investigation into possible violations of the mail fraud statute by the author.[146] As a consequence, the Third Circuit properly upheld a subpoena duces tecum of " '[a]ny and all notes, recordings (mechanical or otherwise), or other record, made by any means, containing, verbatim or in substance, the statements of Pope John Paul II . . . .' "[147] It is further submitted that any absolute ban on the prosecution of authors for fraudulent representations under the Mail Fraud statute is properly left in the hands of the legislature which has the power to limit the applicability of the mail fraud statute.[148] Thus, while the prosecution of an author for misrepresenting the contents of a book is constitutionally permissible, Congress may seek to limit the far-reaching power of such a statute to provide further protections of free speech and to avoid prosecutorial misconduct.[149]

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have been inhibited by the prospect of a prosecution similar to that of Gronowicz. *Id.* at 1001 (Sloviter, J., dissenting).

145. Faced with the reality that defamation actions instituted against authors potentially chill free speech, the Supreme Court in *Sullivan* concluded that this chill is effectively minimized by requiring a showing of actual malice. *See Sullivan*, 376 U.S. at 279-80. The Court did not, however, feel the threat of chill to be so grave as to require a total prohibition on both civil and criminal actions involving speech. *Id.* Likewise, it is submitted that the first amendment does not mandate that the potential chill inflicted on journalists by the mail fraud statute be alleviated by imposing a total prohibition on such prosecution. Rather, the potential chill on free speech is properly minimized by the adoption of safeguards such as the requirement of a minimum showing of requisite intent or the adoption of other prophylactic devices such as a limited journalist privilege. For a discussion of the manner in which the extension of a journalist privilege would serve to alleviate the chill imposed on authors under the mail fraud act, see *infra* notes 152-53 and accompanying text.

146. For a discussion of the journalist's privilege in third party proceedings, see *supra* notes 98-104 and accompanying text.

147. 764 F.2d at 995 (Higginbotham, J., dissenting) (quoting the modified subpoena *duces tecum*).

148. Rather than declare such a prosecution unconstitutional because of the *potential* abuse, it is suggested that until Congress limits the scope of mail fraud prosecutions, the proper protection against prosecutorial abuse is through limitations on the manner in which the government may proceed when investigating an author for possible violations of the mail fraud statute. For a discussion of these limitations, see *infra* notes 148-55 and accompanying text. *See also* Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 423-64 (1983).

149. *See* MODEL PENAL CODE § 250.7, comments at 44 (Tent. Draft. No. 13, 1961) ("[u]sually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security.") (*quoted in Garrison*, 379 U.S. at 70). It is submitted that the legislature must decide whether prosecutors should be prohibited from using the mail fraud statute to investigate an author concerning the contents of his work.

B. *The Manner in Which the Government may Constitutionally Prosecute an Author for Misrepresentations Concerning the Contents of a Book*

Addressing the question of whether "there is a federal common law privilege . . . that protects an author from compelled disclosure to a grand jury of information concerning the truth of representations of fact made about the contents of a book,"[150] the majority concluded that the journalists' privilege was inapplicable to the present action.[151] The Third Circuit, in *Cuthbertson I*, extended a limited first amendment privilege to journalists ordered to testify in third party proceedings, reasoning that "a privilege against disclosure of a reporter's 'sources and unpublished notes' is necessary for 'protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure.' "[152] In *Gronowicz*, the majority refused to extend this privilege to the target of a grand jury investigation. It is submitted that the first amendment interests in preventing intrusion into the editorial process and avoiding self-censorship created by compelled disclosure are at least as strong in grand jury investigations aimed at an author as they are in third party proceedings.[153] Absent such protection, "[t]he 'hassle' and exposure that complying with [such] subpoenas . . . may lead journalists to suppress writings that could pique a prosecutor's curiosity."[154] The Third

150. 764 F.2d at 985-86. The majority noted that if Gronowicz possessed this privilege, the court would reverse the contempt order without addressing the first amendment claim. *Id.*

151. *Id.* at 986. It is unclear from the majority opinion whether the journalists' privilege did not extend to Gronowicz because he was called to produce evidence against himself rather than a third party or because the subpoena sought to confirm named sources rather than disclose unknown confidential sources. *See id.* It is submitted, however, that although the cases cited by the majority in support of the proposition that Gronowicz was not protected by the journalists' privilege were factually distinct, the underlying rationale behind the application of such a privilege in third party proceedings warrants extension of a similar privilege to the target of an investigation. For a discussion of the rationale for granting a limited privilege to journalists called to testify in third party proceedings, see *supra* notes 98-104 and accompanying text.

152. 764 F.2d at 998 (Higginbotham, J., dissenting) (quoting *Cuthbertson I*, 630 F.2d at 147). For a discussion of the extension of the limited journalists' privilege granted journalists called to testify in third party proceedings to targets of grand jury investigations, see *infra* notes 152-57 and accompanying text. For a further discussion of the journalists' privilege and its underlying rationale, see *supra* notes 98-104 and accompanying text.

153. *See* 764 F.2d at 998-99 (Higginbotham, J., dissenting). Judge Higginbotham feared that a journalist may impose self-censorship rather than permit an unchecked subpoena power to be utilized to force him to prove the truth of his work. Thus, the examples of works listed as potential targets in Judge Sloviter's dissent, could be protected if the power of a grand jury is checked by first amendment privileges. *Id.* For a discussion of Judge Higginbotham's dissenting opinion, see *supra* notes 87-111 and accompanying text. For a discussion of Judge Sloviter's opinion, see *supra* notes 112-16 and accompanying text.

154. 764 F.2d at 998 (Higginbotham, J., dissenting) (citing Blasi, *The Newsman's Privilege: an Empirical Study*, 70 MICH. L. REV. 229, 265 (1971); *See generally*

Circuit has recognized a limited journalists' privilege for those called to testify regarding information contained within their work in third party proceedings.[155] As one commentator has noted "the refusal to extend the reporter's privilege to grand jury proceedings while simultaneously recognizing the privilege in criminal trial proceedings is at best anomalous, at worst constitutionally inconsistent."[156] It is submitted that the Third Circuit's refusal to extend the journalists' privilege to the target of a grand jury investigation while simultaneously extending such a privilege to journalists called to testify in a third party proceeding, including those before a grand jury, is likewise "at best anomalous, at worst constitutionally inconsistent." In his dissent Judge Higginbotham perceived no logical reason to exclude a grand jury investigation from the scope of the privilege noting that "[t]he grand jury's interest in investigating and accusing clearly stands on no higher plane than a defendant's right to compulsory process."[157] Moreover the majority set forth no cogent rationale for excluding the journalists' privilege from grand jury proceedings other than noting that the Third Circuit's prior application of the privilege was limited to third party proceedings.[158] It is submitted therefore, that the majority incorrectly prohibited the target of a grand jury investigation from claiming the journalists' privilege.

In support of its position that an author's source materials were discoverable by a grand jury, the majority relied upon *Herbert* in which the Supreme Court held that "a reporter's thoughts, opinions, and conclusions with respect to materials gathered by him were discoverable in a civil action for libel . . . ." It is submitted that the facts of *Herbert* make that case significantly distinct from *Gronowicz*. In *Herbert*, plaintiffs sought access to the editorial process to prove false statements were made with the requisite *mens rea*, not to establish the truth or falsity of a publication.[159] The *Herbert* court noted that in a defamation action the element of intent can only be proven by evidence bearing on the actor's

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Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198, 1225 (1970) (citing *Sullivan*, 376 U.S 254 (1964); *Butts*, 388 U.S. 1930 (1966)). *Sullivan* and *Butts* recognized that the first amendment freed journalists from state defamation statutes that fail to require a certain level of scienter as an essential element of recovery. *See generally* Comment, *supra*, at 1224-32.

155. 764 F.2d at 986. For a discussion of the *Schofield* rule, see *supra* notes 37-38 and accompanying text.

156. Comment, *The Newsperson's Privilege In Grand Jury Proceedings: An Argument For Uniform Recognition and Application*, 75 J. CRIM. L. & CRIMINOLOGY 388, 426 (1984).

157. 764 F.2d at 999 (Higginbotham, J., dissenting).

158. 764 F.2d at 988. For a discussion of the majority's reasoning, see *supra* notes 29-32 and accompanying text.

159. *See Herbert*, 441 U.S. at 170-74. The first amendment requires plaintiff to plead and prove this requisite *mens rea* in addition to showing that the libelous utterances are untrue. *Id.* at 159.

state of mind when the statement was made.[160] The Court reasoned that "it could not 'erect an impenetrable barrier' to the plaintiff's ability to prove its case by protecting defendant's from inquiry into their editorial process."[161] It is submitted that the extension of a limited journalist privilege to the target of a grand jury investigation into mail fraud would not "erect an impenetrable barrier" to the government's attempt to prove the veracity of Gronowicz's representations.[162] Thus, *Herbert* does not supply much support to the majority's position that the target of a grand jury investigation does not possess a privilege similar to the journalists' privilege recognized for journalists called to testify in third party proceedings.

In the alternative, the majority stated that even if Gronowicz could claim the journalists' privilege, the privilege was outweighed by the "compelling governmental interest in investigation of crime."[163] It is

160. *See Herbert*, 441 U.S. at 170. In addressing the contention that the first amendment warrants the extension of an absolute privilege guarding journalists from unwanted inquiry into the editorial process, the Supreme Court noted:

> it is plain enough that the suggested privilege for the editorial *process would constitute a substantial interference* with the ability of a defamation plaintiff *to establish the ingredients of malice* as required by *New York Times*. As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquires . . . can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity."

Id. (footnotes and citations omitted) (emphasis added).

161. 764 F.2d at 994 (Hunter, J., dissenting). For a discussion of Judge Hunter's criticism of the majority's reliance on *Herbert*, see *supra* notes 83-85 and accompanying text.

162. *Id.* at 995 (Higginbotham, J., dissenting). Thus, the purpose of the subpoena directed to Gronowicz was to gather evidence in order to establish truth rather than an inquiry into his state of mind at the time he made the representations. *Id.*

163. *Id.* at 986. The limited journalists' privilege recognized by the Third Circuit for journalists called to testify in third-party proceedings requires the party seeking to overcome the privilege to "demonstrate that he has made an effort to obtain the information from other sources . . .[,] that the only access to the information sought is through the journalist and her sources . . . . [and] persuade the court that the information sought is crucial to the claim." *Criden*, 633 F.2d at 358-59. If the government, therefore, established: 1) that Gronowicz's notes and travel records were essential to determining the truth of his representations and 2) that such information could only be gathered through examination of these documents, the court would grant the government access to these documents. Further, if Gronowicz were indicted, the government, in seeking to convict him under the mail fraud statute, would have to establish that the false representations were made intentionally or in reckless disregard for

submitted, however, that a "governmental interest in investigation of crime," no matter how compelling, does not necessarily override an individual's constitutional rights.[164] In *Gronowicz*, the government's interest in criminal investigation did not outweigh Gronowicz's first amendment right of free speech. The items sought by the subpoena *duces tecum* had "only the most attenuated relevance to any alleged mail fraud."[165] Compliance with such a subpoena would necessitate the handing over of virtually "every piece of paper appellant accumulated in preparing *God's Broker*," demonstrating the weak connection between what the government is investigating and what the subpoena re-

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probable falseness. *See, e.g., Boyer*, 694 F.2d 58, 59 (3d Cir. 1982); *Klein*, 515 F.2d 751, 754 (3d Cir. 1975). In seeking to establish the requisite intent, it is submitted that access into the editorial process of *Gronowicz* would be crucial and therefore that under either the limited journalists' privilege or the *Herbert* rationale, the party seeking to prove intent would always be granted access to the author source materials. For a discussion of *Criden*, see *supra* notes 108-09 and accompanying text. For a discussion of *Herbert*, see *supra* notes 158-61 and accompanying text.

164. 764 F.2d 986. The court did not say that Gronowicz's privilege *would* be extinguished but that it *could* be if the government met the criteria set forth by the Third Circuit cases recognizing a limited common-law privilege for journalists. *Id.* If such a privilege were applied, the court would then have to address the question of whether the government had shown: (1) it attempted to get the information from all alternative sources, (2) the only access to the information was through Gronowicz himself and (3) that the information sought is crucial to the case. *See, e.g., Cuthbertson I*, 630 F.2d at 145. Absent such a showing, under the application of the *Cuthbertson* test to the facts of *Gronowicz*, the contempt order would have to be reversed. *See id.*

165. *See, e.g.*, 764 F.2d at 999 (Higginbotham, J., dissenting) (citing *Herbert*, 441 U.S. at 183; *Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *Criden*, 633 F.2d 346 (3d Cir. 1980)). *See also, Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

As Judge Higginbotham noted, the Third Circuit has:

> recognized that even the fifth and sixth amendment rights of *a defendant seeking exculpatory information* cannot vitiate the privilege—rather, these are interests that the privilege is designed to accommodate. The grand jury's interest in investigating and accusing clearly stands on no higher plane than a defendant's right to compulsory process.

Id. at 999 (Higginbotham, J., dissenting) (citations omitted). If the fifth and sixth amendment rights of others do not necessarily "vitiate the privilege" than neither can the grand jury's nor government's law enforcement goals. *See id.*

Further, in *Branzburg*, Justice Powell recognized that governmental interests are not always sufficient to extinguish this privilege stating:

> [T]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.
>
> In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

408 U.S. at 710 (Powell, J., concurring) (footnote omitted).

For a discussion of the proposition that *Branzburg* recognized a limited journalist privilege in third party proceedings, see *supra* note 60.

quests.[166] Furthermore, the government did not meet it's burden, required before the journalists' privilege is extinguished, of showing the information it sought was crucial or unobtainable from other sources.[167] Absent such showing, even a compelling government interest is insufficient to extinguish a limited journalist privilege.[168]

As an alternative to an application of the journalists' privilege in a grand jury proceeding,[169] Judge Becker reasoned that the standards of the *Schofield* test were "heightened" where "core First Amendment interests are implicated by a grand jury subpoena."[170] Judge Becker viewed this judicial role as an "exercise of [a court's] supervisory power."[171] While noting that his test was not "tantamount to a first amendment privilege for targets or subjects of grand jury investigations,"[172] it is submitted that a district court properly should consider the factors embodied in the limited journalists' privilege thereby acting as a check against prosecutorial abuse and undue intrusion into the dissemination of speech and ideas.[173] It is further submitted, however, that such a

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166. 764 F.2d at 999-1000 (Higginbotham, J., dissenting). In support of his contention that much of the information the government sought was only remotely relevant to the mail fraud investigation, Judge Higginbotham noted that the subpoenas requested:

> [a]ny and all handwritten or typed documents containing the name, signature, or any other notation connotating the names of Pope John Paul II, John Cardinal Krol, Cardinal Rubin, Cardinal Wyszynski and/or Cardinal Glemp for the period January 1, 1979 to the present.
>
> . . . .
>
> [a]ny and all written correspondence and/or letters bearing the signature of any agent, employee or representative of the Vatican and/or the Archdiocese of Philadelphia for the time period January 1, 1979 to the present.

Id.

167. *Id.* As Judge Higginbotham exclaimed, "[t]he breadth of these requests bespeaks a fishing expedition, not an attempt to obtain 'crucial' information." *Id.* Additionally, as Judge Higginbotham noted, "the record does not indicate that the government has made any effort to conduct its investigation in a manner less threatening to a free press." *Id.*

168. *Id.* The decision does not preclude the government from seeking to overcome the privilege based on a proper showing at a later date. *Id.*

169. For a discussion of the application of the journalists privilege to grand jury proceedings see *supra* notes 124-128 and accompanying text.

170. 764 F.2d at 991 (Becker, J., concurring). Since Gronowicz did not challenge the sufficiency of the government's affidavits but rather asserted that the first amendment grants him, as an author of a book, an absolute privilege from a grand jury investigation, Judge Becker did not vote to reverse the contempt order. *Id.* at 990-91 (Becker, J., concurring).

171. *Id.* at 991 (Becker, J., concurring).

172. *Id.* Judge Becker based his agreement with the majority precisely on the basis that he does not see precedent as supporting the extension of a first amendment privilege to targets or subjects of grand jury investigations. *Id.* This does not, however, mean that the court can simply ignore first amendment principles until the proceedings have advanced past the grand jury stage. *Id.*

173. Although declining to set forth a precise formula for a "heightened Schofield showing," Judge Becker indicated that one factor to consider would be

heightened showing left to the discretion of trial judges to determine when such a showing is necessary is not adequate to ensure journalists' expression is not chilled by the fear of having the truth of representations about their work be investigated by federal prosecutors.[174] Further, the existence of a constitutional right in a given situation should not be left to the discretion of a trial judge in any particular case. The journalists' privilege presumes the information a journalist possesses is protected and places the burden on the party seeking the information to justify ordering its production thereby reaffirming the journalists' confidence in the sanctity of his sources and his constitutional rights.

IV. CONCLUSION

The Constitution permits a grand jury investigation into possible violations of the mail fraud statute by an author arising out of possible misrepresentations about the contents of his work, so long as a showing of intent or reckless disregard for probable falsehood is established.[175] In reaching this conclusion, the Third Circuit reaffirmed this nation's long held belief that "*there is no constitutional value in false statements of fact.*"[176] However, our legal system has also long ago recognized that "[a]lthough the erroneous statement of fact is not worthy of constitutional protections, it is nevertheless inevitable in free debate. . . . The first amendment requires that we protect some falsehood in order to protect speech that matters."[177] The journalist privilege extended to journalists called to testify in third party proceedings recognizes that some information possessed by journalists must be privileged in order to protect speech from unnecessary chill.[178] Likewise, a similar privilege must be extended to targets of grand juries in order to prevent

". . . whether the prosecutor is acting in bad faith." *Id.* at 991-92 (Becker, J., concurring). When deciding whether to extinguish a journalists' privilege, it is submitted that a court would conclude that information sought in bad faith or to harass a journalist would not be "crucial" to any claim. Further, it is submitted that under such circumstances, it would be difficult for a prosecutor to establish the information was not obtainable from other sources. Such investigations could properly be labeled, as in the words of Judge Higginbotham, "fishing expedition[s], [rather than] an attempt to obtain crucial information." *Id.* at 1000 (Higginbotham, J., dissenting). It is submitted that such a "fishing expedition" could be viewed as prosecutorial misconduct under Judge Becker's test, thus giving rise to a denial of the request for the subpoenaed items.

174. For a discussion of the manner in which grand jury investigations into the truth of an authors' work can chill expression, see *supra* note 141 and accompanying text.

175. For a discussion of the conclusion that the first amendment does not prohibit an investigation into possible violations of the mail fraud statute on the part of an author, see *supra* notes 122-48 and accompanying text.

176. 764 F.2d at 996 (Higginbotham, J., dissenting) (quoting *Gertz*, 418 U.S. at 339-41) (emphasis supplied by Judge Higginbotham).

177. *Id.* at 996 (Higginbotham, J., dissenting) (quoting *Gertz*, 418 U.S. at 339-41).

178. For a discussion of the proposition that the journalists' privilege

suppression (self-censorship) based upon fear of grand jury investigations.[179] The mere fact that the journalist's speech is alleged to be false does not remove the speech from the realm of constitutional protection. The privilege should not be extinguished by an allegation that the journalist is guilty of fraudulent acts because the protection is not premised on a reporter "being purer or more godlike . . . it is premised on the First Amendment."[180]

Virginia L. Flick

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serves to protect authors from unnecessary chill when publishing a work on a controversial topic, see *supra* note 151 and accompanying text.

179. For a discussion of the proposition that the journalists' privilege extended to journalists called to testify in third party proceedings must be extended to journalists who are targets of grand jury investigations arising out of their work product, see *supra* notes 152-153 and accompanying text.

180. Note, *Qualified Privilege for Journalists*, Branzburg v. Hayes: *A Decade Later*, 61 J. URB. L. 463, 486 n.197 (1984) (quoting attorney Floyd Abrahms as reported in *News Media & The Law*, Oct.-Nov. (1981) at 19).